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In The

Supreme Court of the United States

DEC 27 2002

A. T. MASSEY COAL COMPANY, INC., *et al.*,

Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit erroneously deny Petitioners the benefit of this Court's precedent in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality), by relying on statutory distinctions rather than a material factual difference, in holding that Petitioners were not in a position substantially identical to the operator in *Eastern*, whose beneficiary assignments under the Coal Industry Retiree Health Benefit Act of 1992 were held to be unconstitutional by a majority of the Justices because Eastern did not sign a coal wage agreement which promised lifetime health benefits.

LIST OF PARTIES

Petitioners A.T. Massey Coal Company, Inc.; Massey Coal Services, Incorporated; Peerless Eagle Coal Company and Tennessee Consolidated Coal Company were plaintiffs in the proceedings below. Respondents Larry G. Massanari in his capacity as Acting Commissioner of Social Security; Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carl E. Van Horn, and Gail R. Wilensky, Trustees of the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America Combined Benefit Fund were defendants in the proceedings below. Jo Anne B. Barnhart is currently the Commissioner of Social Security.

The counterclaim defendants to the action below were the above-named Petitioners and Rawl Sales and Processing, Co.; Omar Mining Co.; PM Charles Coal Co.; Rocky Hollow Coal Company; Sprouse Creek Processing Co.; Trace Fork Coal Co.; Big Bear Mining Co.; Dehue Coal Co.; Douglas Pocahontas Coal Corp.; Goals Coal Co.; Green Valley Coal Co.; Hopkins Creek Coal Co.; Joboner Coal Co.; Lick Branch Coal Co.; Eagle Energy, Inc.; Power Mountain Coal Co.; Majestic Mining, Inc.; Performance Coal Co.; Vantage Mining Co.; Russell Fork Coal Co.; Vesta Mining Co. and Williams Mountain Coal Co.

CORPORATE DISCLOSURE STATEMENT

Massey Coal Services, Incorporated is a subsidiary of Massey Coal Sales Company, Inc. which is a subsidiary of A.T. Massey Coal Company, Inc.

Peerless Eagle Coal Company is a subsidiary of Sidney Coal Company, Inc. which is a subsidiary of A.T. Massey Coal Company, Inc.

Tennessee Consolidated Coal Company is a subsidiary of Martin County Coal Corporation which is a subsidiary of A.T. Massey Coal Company, Inc.

A.T. Massey Coal Company, Inc. is a subsidiary of Massey Energy Company, which is a publicly held company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 305 F.3d 226 (4th Cir. 2002), and is reprinted in the Appendix hereto at A-1-27.

The Order and Memorandum Opinion of the United States District Court for the Eastern District of Virginia (Payne, D.J.) are reported at 153 F. Supp. 2d 813 (E.D. Va. 2001), and are reprinted in the Appendix hereto at B-1-42.

The Order amending the judgment entered by the United States District Court for the Eastern District of Virginia (Payne, D.J.) is reprinted in the Appendix hereto at C-1-2.

STATEMENT OF JURISDICTION

The judgment for the United States Court of Appeals for the Fourth Circuit was entered on September 18, 2002. The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution is reproduced in the Appendix hereto at D-1.

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and selective portions are reproduced in the Appendix hereto at D-3-8.

The Administrative Procedure Act is codified at 5 U.S.C. § 701 *et seq.*, and selective portions are reproduced in the Appendix hereto at D-2.

STATEMENT OF THE CASE

This case involves the Commissioner of Social Security's ("Commissioner" or "SSA") refusal to withdraw the assignment of liability for health care premiums for retired coal miners (and their dependents) to A.T. Massey Coal Company, Inc., Massey Coal Services, Incorporated, Peerless Eagle Coal Company and Tennessee Consolidated Coal Company (collectively "Petitioners") under section 9706(a)(3) of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act" or "Act"), 26 U.S.C. § 9706(a)(3), in response to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Petitioners sought a ruling that the Commissioner violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, when, in response to the Supreme Court's decision in *Eastern*, the Commissioner voided the assignment of Coal Act beneficiaries to 122 companies that did not sign a 1974 or later coal wage agreement, but refused to void Petitioners' assignments. App. B-6, B-6 n.3. Petitioners' claim was based upon the fact their position is substantially identical to that which was before the Court in *Eastern*, which held that the assignment of liability to a company that did not sign a 1974 or later coal wage agreement was unconstitutional because the 1974 wage agreement was the first to provide that United Mine Workers of America retirees would have lifetime health care.

Petitioners also sought a declaratory judgment that section 9706(a)(3) of the Coal Act is unconstitutional as applied to assignments made to them, because they did not sign a 1974 or later coal wage agreement. App. B-6, B-25.

Finally, Petitioners sought an Order directing Respondent Trustees of the United Mine Workers of America Combined Benefit Fund ("Trustees") to return all

premiums previously paid by Petitioners on behalf of the wrongfully assigned beneficiaries. App. B-6-7.

The United Mine Workers of America Combined Benefit Fund ("Combined Fund") and its Trustees filed a counterclaim against the Petitioners and twenty-three additional companies (on the basis that the additional companies were "related persons" to Petitioners as that term is defined in the Coal Act) seeking a declaratory judgment that the Coal Act is constitutional as applied to Petitioners. App. A-17; App. B-7. The Trustees also sought damages incurred as a result of the Petitioners' failure to pay premiums on behalf of the challenged beneficiaries and injunctive relief requiring Petitioners to pay future premiums and barring Petitioners from disposing of corporate assets. App. A-17; App. B-7. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

On July 19, 2001, the United States District Court for the Eastern District of Virginia denied relief to Petitioners ruling that (1) the Coal Act was constitutional as applied to Petitioners, (2) the Commissioner did not violate the APA when he voided the assignment of Coal Act beneficiaries made to other companies that did not sign a 1974 or later coal wage agreement, but refused to void assignments to Petitioners because, although Petitioners did not sign a 1974 or later agreement, they were not similarly situated to Eastern Enterprises, and (3) denied the Trustees' counterclaim seeking damages and injunctive relief. App. B-38-41. The district court, on August 28, 2001, entered an amended judgment which incorporated a stipulation setting forth the amount of Petitioners' liability to the Combined Fund. App. C-1-2.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision holding that the Commissioner did not err in applying section 9706(a)(3) of the Coal Act to make assignments to Petitioners. App. A-26. The court's rationale was based on the operation of separate

provisions of the Coal Act which classify Petitioners as "related persons" to companies that signed 1974 and later coal wage agreements. *Id.* The court reasoned that, since *Eastern Enterprises* is a plurality decision for which no common rule can be identified, the result of that case would only be applicable in this case if Petitioners are "substantially identical" to Eastern Enterprises ("Eastern"). App. A-18-20. The court concluded that Petitioners' statutory status as related persons to post-1974 signatories rendered them not substantially identical to Eastern, and thus held that assignments to Petitioners may constitutionally be made. App. A-23-26.

A. THE COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992

The history of the Coal Act has been discussed at length in a number of cases including *Eastern Enterprises*, 524 U.S. at 504-15, and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 946-48 (2002). A brief summary follows.

The Coal Act, enacted in 1992, resulted from concern about the financial stability of the UMWA 1950 Benefit Plan ("1950 Benefit Plan") and the UMWA 1974 Benefit Plan ("1974 Benefit Plan") - collectively bargained retiree health benefit plans created by the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA"). These multiemployer health benefit plans were created and maintained pursuant to a series of National Bituminous Coal Wage Agreements ("NBCWAs") negotiated over several decades by the UMWA and the BCOA. The 1950 NBCWA created the United Mine Workers of America Welfare and Retirement Fund of 1950. Twenty-four years later, in order to comply with the newly enacted Employee Retirement Income Security Act of 1974, the 1974 NBCWA split the Welfare and Retirement Fund of 1950 into four separate plans. Two of these plans, the aforementioned 1950 Benefit Plan and the 1974 Benefit Plan, provided health benefits to eligible UMWA retirees and their dependents.

As regards retiree health benefits, the 1974 NBCWA was a watershed collective bargaining agreement because it was the first coal wage agreement to expressly provide that retirees would have health care for life.

During the term of the 1988 NBCWA, the 1950 and 1974 Benefit Plans encountered severe financial problems. In 1992, in response to these financial difficulties, Congress enacted the Coal Act. The Coal Act merged the 1950 and 1974 Benefit Plans into a new multiemployer plan known as the UMWA Combined Benefit Fund. Under section 9704 of the Coal Act, health care for Combined Fund beneficiaries is financed through the assessment of per-beneficiary premiums to companies that were signatory to a NBCWA ("signatory operators"), and who are assigned beneficiaries by the Commissioner pursuant to section 9706(a) of the Act. 26 U.S.C. §§ 9704, 9706(a). The total premium an assigned operator must pay to the Combined Fund is a function of the number of retired miners and dependents assigned to the operator by SSA. Additionally, section 9704 provides that any related person to an assigned operator is jointly and severally liable for payment of the operator's Combined Fund premiums. An entity is a "related person" to the responsible signatory operator if that entity was a member of a controlled group of corporations which includes the operator on July 20, 1992. 26 U.S.C. § 9701(c)(2).[1]

The Coal Act contains a three-tiered priority that SSA must follow for making assignments of retired UMWA miners to signatory operators. 26 U.S.C. § 9706(a). Under section 9706(a)(3), if the retiree's most recent employer is still in business but did not sign the 1978 or a subsequent coal wage agreement, the retiree is to be assigned to the pre-

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[1] If the responsible signatory operator was not in business on July 20, 1992, then related person status is determined as of the time immediately before the signatory operator ceased to be in business. 26 U.S.C. § 9701(c)(2)(B). Also, other types of corporate relationships, not relevant here, will establish related person status. *See* 26 U.S.C. § 9701(c)(2)(A)(ii)-(iii).

1978 signatory operator that employed him longest. Thus, under section 9706(a)(3) the Commissioner could make assignments to an operator that had not been signatory to a UMWA agreement for thirty or forty years. The assignment rules also provide that where the signatory operator was no longer in business, the Commissioner could make the assignments to a "related person" to the defunct operator.

Companies that did not sign a 1974 or later agreement, but received assignments under section 9706(a)(3), are commonly referred to as "super-reachbacks." Assignments to super-reachbacks were particularly controversial due to their extreme retroactive nature, and the fact the 1974 NBCWA was the first to provide that retirees would have health benefits for life. Assignments to super-reachbacks led to numerous constitutional challenges, which this Court ultimately addressed in *Eastern Enterprises*, 524 U.S. 498.

B. THE *EASTERN ENTERPRISES* DECISION

In June, 1998, this Court considered whether application of section 9706(a)(3) of the Coal Act to assign liability to a company that did not sign a 1974 or subsequent NBCWA was unconstitutional. *Eastern Enterprises*, 524 U.S. at 503-04, 536-38. The Court focused on the 1974 NBCWA as especially significant to its Fifth Amendment analysis because it was the first coal wage agreement to contain language stating UMWA retirees would have health benefits for life. In a 5-4 plurality decision the Court concluded that assignments to companies which did not sign the 1974 NBCWA were void as unconstitutional, primarily because of the "extremely retroactive burden" the Coal Act places on such companies. *Id.* at 538.

1. The Facts of the *Eastern* Case

Eastern conducted extensive coal mining operations until the end of 1965 and signed each NBCWA between 1947 and 1964. *Id.* at 516. At the end of 1965, Eastern transferred its coal-related operations to a wholly-owned subsidiary, Eastern Associated Coal Corp. ("EACC"). *Id.* Eastern retained its 100 percent stock ownership in EACC through a subsidiary corporation until 1987. *Id.* at 516 (plurality), 565-66 (Breyer, J., dissenting). Between 1966 and 1987, Eastern effectively ran EACC, sharing officers and supervising management of EACC. *Id.* at 516 (plurality), 565-66 (Breyer, J., dissenting). Eastern officials, in their role as EACC directors, ratified the post-1965 coal wage agreements, *id.* at 566 (Breyer, J., dissenting), including the 1974 and 1978 agreements, the first ones to expressly refer to or provide guarantees regarding lifetime retiree health care benefits. From 1966 to 1987 Eastern received dividends of more than $100 million from EACC. *Id.* at 516 (plurality), 565-66 (Breyer, J., dissenting). In 1987, Eastern sold EACC to a third party. Following the enactment of the Coal Act in 1992, the Commissioner assigned to Eastern pursuant to section 9706(a)(3) over 1,000 retired miners who had worked for Eastern before 1966, at an estimated cost to Eastern of $50 to $100 million. *Id.* at 517, 529. In its challenge to the Coal Act, Eastern argued, among other things, that it was irrational for the Congress to require it to pay for lifetime health benefits for UMWA retirees when Eastern never signed a UMWA wage agreement promising such benefits. *Id.* at 529-37.

2. The *Eastern* Decision

Five Justices found that the Coal Act was unconstitutional as applied to Eastern. *Id.* at 522-50. A four Justice plurality opinion authored by Justice O'Connor held that the Act effected an unconstitutional taking of Eastern's property and therefore violated the Takings Clause of the Fifth Amendment. *Id.* at 522-38. Justice Kennedy filed an

opinion that concurred in part and dissented in part. *Id.* at 539-50. Justice Kennedy rejected the plurality's Takings Clause analysis but held that the Coal Act violated the Due Process Clause of the Fifth Amendment. *Id.*

Both the plurality and Justice Kennedy concluded that the Coal Act was unconstitutional because it imposed severe, retroactive liability on Eastern without justification. The plurality pointed to the fact that the Coal Act reached back over thirty years to impose liability on Eastern's activities in 1965 and earlier. *Id.* at 532. Justice Kennedy likewise noted that the Coal Act reached back thirty-five years to tag Eastern with liability for lifetime UMWA retiree health benefits that Eastern could never have envisioned in 1965 when it stopped mining coal. Justice Kennedy called this "a retroactive effect of unprecedented scope." *Id.* at 549.

The Court was fully aware of Eastern's ownership and active involvement in the operation of a subsidiary, EACC, that signed not only the 1974 and 1978 coal wage agreements, but the 1981 and 1984 agreements as well. This relationship notwithstanding, the plurality opinion and Justice Kennedy's concurrence both stressed that Eastern was not responsible for creating an expectation of lifetime benefits because *it* did not sign the 1974 agreement, or any subsequent agreement which promised such benefits. *See id.* at 550 (Kennedy J., concurring in part) ("[T]he expectation [of lifetime benefits] was created by promises and agreements made long after Eastern left the coal business."); *see also id.* at 530-31 (plurality). As Justice Kennedy noted, Eastern was not responsible "for the perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy." *Id.* at 550.[2] Accordingly, a majority of the

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[2] The plurality also recognized that the financial crisis in the benefit plans was caused initially when the 1974 and 1978 agreements expanded benefits, but that Eastern was not responsible, notwithstanding its ownership of EACC, because Eastern did not itself adopt the plans. *Eastern Enterprises*, 524 U.S. at 531.

Court found section 9706(a)(3) of the Coal Act unconstitutional as applied to Eastern, without regard to the fact that it was also the parent of EACC (and a member of EACC's controlled group) in 1974, and for thirteen years thereafter. *Id.* at 528-29, 549-50.

C. FACTS RELATING TO ASSIGNMENTS MADE TO PETITIONERS

Massey Coal Services, Inc. ("Massey Services") is a subsidiary of A.T. Massey Coal Company ("A.T. Massey"). App. B-23. Neither A.T. Massey nor Massey Services has ever been signatory to a UMWA coal wage agreement, or employed any person under a UMWA agreement. App. B-22-23. Nevertheless, under section 9706(a)(3), the Commissioner assigned A.T. Massey and Massey Services the responsibility to pay premiums to the Combined Fund for thirty-five retired UMWA miners and their dependents. *Id.* None of these retirees were ever employed by A.T. Massey or Massey Services. Rather, they were employed by either Merrill Coal Company ("Merrill"), Gay Mining Company ("Gay Mining"), or Massey Coal Mining Company ("Massey Mining"). *Id.* None of these companies signed a 1974 or later coal wage agreement. *Id.* Indeed, April 18, 1964 was the latest that any of them was signatory to a coal wage agreement.[3]

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[3] Merrill was signatory to UMWA coal wage agreements between 1933 and June 30, 1958. Merrill merged into Gay Mining on July 1, 1958, and ceased to exist. Gay Mining was itself signatory to UMWA wage agreements between 1942 and 1958. Immediately after Merrill merged into Gay Mining in July 1958, Gay Mining changed its name to Massey Coal Mining Company. Massey Mining became a UMWA signatory effective with the June 30, 1958 name change, and it remained signatory to a coal wage agreement until April 18, 1964. Massey Mining changed its name to Ben Creek Coal Company on January 6, 1977, more than twelve years after it was last signatory to a coal wage agreement. App. B-22-23.

Peerless Eagle Coal Company ("Peerless Eagle"), a subsidiary of A.T. Massey, has never been signatory to a UMWA coal wage agreement. App. B-23. The Commissioner assigned Peerless Eagle premium responsibility for twenty-two retired miners and their dependents, based on their employment by Peters Creek Coal Company ("Peters Creek"). *Id.* Peters Creek was last signatory to a coal wage agreement in 1958, and merged into Peerless Eagle on March 1, 1962. *Id.*

Tennessee Consolidated Coal Company ("TCC"), a subsidiary of A.T. Massey, was last signatory to a coal wage agreement in 1960. *Id.* The Commissioner assigned TCC premium responsibility for ninety-nine retired miners (plus their dependents). *Id.*

D. THE COMMISSIONER'S RESPONSE TO *EASTERN ENTERPRISES*

Beginning in September, 1998, the Commissioner engaged in administrative decision making which reflected the agency's acquiescence to the Court's June 25, 1998 decision in *Eastern Enterprises*. Specifically, as of April 1, 1999, the agency had voided *ab initio* beneficiary assignments previously made to at least 122 coal companies that, like Eastern, had not signed a 1974 or later coal wage agreement. App. B-6 n.3.

By letters dated July 29 and August 17, 1998, Petitioners asked the Commissioner to void certain assignments to them in accordance with the Court's decision in *Eastern Enterprises*. By letters dated April 1, 1999, Marilyn G. O'Connell, Associate Commissioner for Program Benefits, denied these requests. *Id.* Ms. O'Connell stated that the agency did not consider the companies similarly situated to Eastern because, unlike Petitioners, Eastern was not a member of a controlled group consisting of a 1974 or later signatory on the date specified under the Coal Act for establishing "related person" liability. *Id.*

E. THE DECISION BELOW

The United States Court of Appeals for the Fourth Circuit reviewed the district court's award of summary judgment to the Commissioner and the Combined Fund *de novo*, and affirmed by a 2-1 majority. App. A-4, A-27. The court characterized Petitioners' claim as turning on a single issue – whether the Commissioner's assignments are unconstitutional under *Eastern Enterprises*.[4] App. A-18. The court first reviewed Justice O'Connor's plurality opinion holding that, under the Fifth Amendment Takings Clause, the magnitude of Eastern's retroactive liability was severely disproportionate to the conduct giving rise to that liability and therefore unconstitutional. App. A-14-15. The court then reviewed Justice Kennedy's concurring opinion, which held that due to the severe retroactive liability of the Commissioner's assignments, Due Process was violated thereby rendering the assignments unconstitutional. App. A-15-16.

The court then determined that, since there is "no theoretical overlap between the rationales employed by the plurality and Justice Kennedy, . . . *Eastern Enterprises* 'mandates judgment for . . . plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence.'" App. A-19-20 (quoting *Unity Real Estate v. Hudson*, 178 F.3d 649, 659 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999)). The court thus identified the task before it as determining "what it means to be in a position 'substantially identical' to that of Eastern" and noted that "[it] must identify and examine the factors that were critical to both the plurality and Justice Kennedy in their respective determinations that the Commissioner's assignments to

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[4] The court also reviewed the standards for reversing final agency action under section 706 of the APA, and determined that its decision upholding the constitutionality of the Commissioner's assignments to Petitioners also disposed of their APA claim. *Id.* App. A-18 n.16.

Eastern were unconstitutional." App. A-20. The court reasoned that "[t]he Massey Plaintiffs are only entitled to succeed here if their position, with respect to every critical factor, is substantially identical to that of Eastern." *Id.* Finally, the court concluded that "a coal operator stands in a position 'substantially identical' to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs." *Id.*

After so defining the parameters of what it means to be "substantially identical" to Eastern, the court proceeded to apply that analysis to the Petitioners. The court noted that since it was clear Petitioners did not sign or operate under the 1974 or subsequent NBCWAs, "it might appear at first glance that the experiences of the Massey Plaintiffs in the coal mining industry are 'substantially identical' to those of Eastern." App. A-23. Ultimately, however, the panel majority concluded that Petitioners' position is not substantially identical to Eastern's, not because of any meaningful factual distinction with respect to Petitioners' connection to 1974 or subsequent NBCWAs, but because Petitioners' factual experience had to be examined against the backdrop of the Coal Act's concepts of "related persons" and "controlled groups". *Id.* The court concluded that it was Congress' intent to aggregate the members of a corporate family into a single entity for the purposes of assigning Combined Fund liability. App. A-24.

The panel majority considered and rejected Petitioners' contention that application of the Coal Act's related person definition to Petitioners could not supply a material fact sufficient to overcome the constitutional deficiency identified in *Eastern*, because Eastern itself had been in a corporate control group with a post-1974 signatory until 1987. App. A-24-26. The court stated that, by virtue of selling EACC prior to July 20, 1992, the Coal Act designates Eastern as a discrete entity, whereas, the Act gathers Petitioners with other companies that were members of its controlled group (on July 20, 1992) for purposes of

determining liability under the Act. App. A-25. Therefore, in examining whether Petitioners' experiences in the coal industry are substantially identical to Eastern's, the court determined that it "must analyze the experiences of the Massey Group as 'related persons,' *i.e.*, as a whole." *Id.*

The court then concluded that since Eastern was no longer related to EACC as of July 20, 1992, EACC's post-1974 employment experiences could not be attributed to Eastern under the Coal Act. *Id.* However, the court reasoned that since the Act's related person provisions applied to Petitioners (because on July 20, 1992 they were related to companies that had signed a 1974 agreement), the post-1974 signatory status of certain of Petitioners' related persons must be attributed to Petitioners, themselves. Based on this analysis the panel majority concluded that Petitioners are not in a position substantially identical to Eastern's. App. A-26.

REASONS FOR GRANTING THE WRIT

The writ should be granted so that the Court may address an important question of federal law that has not been, but should be, settled by this Court.

A. THERE IS A NEED FOR INSTRUCTION ON APPLICATION OF THE "SUBSTANTIALLY IDENTICAL" TEST THAT THE LOWER COURTS HAVE DEVISED TO DETERMINE WHEN TO APPLY THE RESULT OF PLURALITY DECISIONS IN WHICH THERE IS NO CLEAR RULE OF LAW WHICH COMMANDED A MAJORITY

This Court has never had occasion to instruct the lower courts on how to apply the precedent established by decisions which lack a majority opinion and for which the "narrowest grounds" test announced in *Marks v. United States*, 430 U.S. 188 (1977) is not relevant. This case presents both an ideal opportunity and need to do so.

This Court established in *Marks* that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (citation omitted). As the lower courts have recognized on various occasions, not every case is suitable for application of the "narrowest grounds" test. *See, e.g., Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3d Cir. 1994). This Court's splintered decision in *Eastern Enterprises* is such a case.

Three appellate courts have considered whether to apply the *Eastern Enterprises* result to the parties before them and have determined that the "narrowest grounds" test is not workable for that decision. App. A-18-19; *Berwind Corp. v. Commissioner of Soc. Sec.*, 307 F.3d 222, 234 (3d Cir. 2002); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Each has concluded that there is no theoretical overlap between the rationales employed by the plurality and Justice Kennedy because neither the plurality's Takings Clause analysis nor Justice Kennedy's substantive due process rationale may be considered to be a subset of the other.

The courts thus have turned to the "substantially identical" test to determine under what circumstances the *Eastern Enterprises* precedent requires the conclusion that assignments are void as unconstitutional.[5] App. A-19-20; *Berwind*, 307 F.3d at 234. The courts agree that in cases in which the "substantially identical" test is to be applied, they are to find for the plaintiff before them only if that person is "in a substantially identical position" to the party in the plurality decision. App. A-19-20; *Berwind*, 307 F.3d at 234.

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[5] The D.C. Circuit, while not calling it a "substantially identical" test, engaged in essentially the same type of analysis in one part of its opinion to compare Eastern to the entities in the case before it, as the other circuits have done. *See Association of Bituminous Contractors*, 156 F.3d at 1256.

Applying the "substantially identical" test in the case below, the Fourth Circuit stated that to "determine what it means to be in a position 'substantially identical' to that of Eastern . . . [the court] must identify and examine the factors that were critical to both the plurality and Justice Kennedy in their respective determinations that the Commissioner's assignments to Eastern were unconstitutional." App. A-20. The court then concluded that

> a coal operator stands in a position "substantially identical" to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs. *See Unity Real Estate*, 178 F.3d at 659 (observing that "[l]anguage in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974" indicates that connection to 1974 and subsequent NBCWAs is a critical factor).

Id.

In considering whether Petitioners met this test, however, the panel majority considered not only whether, like Eastern, Petitioners "had no connection to the 1974 or subsequent NBCWAs" as a factual matter, but also whether Petitioners were connected to a statutorily-defined "related person" which had signed a 1974 or subsequent NBCWA. In so doing, the court expanded the "substantially identical" test, which is meant to take into account only factors critical to the majority, to also include application of the related person provisions of the Coal Act, which have no bearing on the critical facts the plurality and Justice Kennedy relied on in reaching their respective conclusions that assigning super-reachbacks liability to provide benefits for their former employees is unconstitutional. The Third Circuit has done likewise. *See, e.g., Berwind Corp.*, 307 F.3d 222.

While it may be that a properly applied "substantially identical" test is suited to the task at hand, it is apparent that the lower courts have erroneously modified the test in the post-*Eastern Enterprises* cases to deprive litigants in a substantially identical position of the benefit of this Court's constitutional jurisprudence. Where, as here, the lower courts rely on a statutory definition to recharacterize the constitutional significance of facts that were critical to the Court's holding, the lower courts impermissibly limit application of this Court's precedent. There is a need, therefore, for the Court to provide guidance for the lower courts as to how its plurality decision in *Eastern Enterprises*, as well as other similarly fragmented decisions, is to be applied.[6] The remainder of this petition will address this need for clarification as presented by the facts in this case.

B. THE FOURTH CIRCUIT ERRED IN RELYING ON A STATUTORY CONSTRUCT TO FIND THAT PETITIONERS ARE NOT SUBSTANTIALLY IDENTICAL TO EASTERN

As with Eastern Enterprises, the Coal Act had an extreme retroactive effect and imposed a severe financial burden[7] on the Petitioners for a financial crisis

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[6] Although plurality decisions which lack even a narrow theoretical underpinning are not common, they are necessarily an important component of the Court's jurisprudence. The fact that a majority of the Justices are unable to agree on the analytical underpinning for the Court's decision in a particular case does not mean that the result should not be widely applied to all cases which present a substantially identical fact pattern. *See, United States v. Yakubu*, 936 F.2d 936, 939 (7th Cir. 1991) ("The Supreme Court does not sit to decide cases that will control only cases having identical facts.").

[7] Petitioners are jointly and severally liable for their respective premium obligations. *See* 26 U.S.C. § 9704(a). To date that liability is over $1,000,000. App. B-22-23. It will, of course, continue to increase so long as any of the assigned retirees or their dependents remain alive.

that neither they nor the pre-1974 signatories who employed these miners had any responsibility for creating. The facts here are substantially identical to Eastern's in all material respects. The Fourth Circuit acknowledged as much, but erred in going beyond the facts to find that application of a statutory definition created a dispositive distinction between Petitioners and Eastern.

1. Petitioners are substantially identical to Eastern Enterprises.

Like Eastern, neither the Petitioners nor the actual employers of the miners assigned to Petitioners signed any agreement that promised lifetime retiree health benefits. In fact, Petitioners A.T. Massey, Massey Services, and Peerless Eagle never signed any UMWA agreement. There is no dispute that the actual employers of the miners in this case (Merrill, Gay Mining, Massey Mining, Peters Creek and TCC) ceased to be signatory to a coal wage agreement at least ten years before the 1974 NBCWA – the first agreement to promise lifetime health benefits to miners.[8] Plainly, the Coal Act imposes no less a retroactive burden on Petitioners arising out of employment with these companies than it imposed on Eastern.

It was the Coal Act's extreme retroactivity, and its consequent disruption of Eastern's reasonable expectations, that provided the most notable point of agreement between the plurality opinion and Justice Kennedy's concurrence in *Eastern*. *Compare Eastern*, 524 U.S. at 534 (extent of Eastern's retroactive liability is substantial and far reaching) (plurality), *with id.* at 549 (as plurality explains, retroactive effect of the Coal Act is of

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[8] Peters Creek was last signatory in 1958. TCC was last signatory in 1960. Merrill, Gay Mining and Massey Mining were last signatory in 1964.

unprecedented scope) (Kennedy, J., concurrence). Indeed, although there is no common theoretical basis for the holding in *Eastern*, it was the severely retroactive nature of assignments grounded in employment with pre-1974 signatories that provided the common denominator in the opinions which comprise the *Eastern* majority.

For the same reasons it is unconstitutional to make assignments to pre-1974 signatory Eastern Enterprises under section 9706(a)(3), it is unconstitutional to make such assignments to Petitioners. The retroactive effect of the Coal Act on Petitioners is, if anything, more extreme than it was on Eastern because the employers here all ceased to be signatories prior to Eastern.[9] The fact that on July 20, 1992 Petitioners were part of a controlled group that included companies that had signed 1974 and later coal wage agreements does not supply a material fact sufficient to distinguish Petitioners from Eastern, because Eastern itself was related to a company that signed the 1974 and subsequent coal wage agreements. Given that there are no distinctions of consequence between Eastern's facts and those in this case, the Court's decision in *Eastern* compels the conclusion that SSA's assignment of the beneficiaries challenged here violates the Takings and Due Process Clauses of the Fifth Amendment in the same manner, and to the same extent, as those constitutional protections were violated under the analyses articulated in the plurality opinion, and in Justice Kennedy's concurring

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[9] Indeed, in several respects Petitioners' connections to the pre-1974 signatory companies which employed the miners in this case are more attenuated than Eastern's relationship with EACC. For example, unlike Eastern, none of the Petitioners mined coal pursuant to a UMWA contract and then transferred their coal mining operations into a newly formed subsidiary which signed the 1974 and subsequent NBCWAs. Nor did Peerless Eagle, TCC or Ben Creek (or its corporate predecessors Merrill, Gay Mining, and Massey Mining) continue to operate their own mining operations under a NBCWA after 1974, as did Eastern's subsidiary EACC.

opinion. Moreover, the Commissioner's refusal to void Petitioners' assignments separately violates section 706 of the APA.[10]

In analyzing Eastern's claims that the Coal Act was unconstitutional as applied to it, a majority of the Justices in *Eastern* declined to ascribe any constitutional significance to Eastern's ownership of a post-1974 signatory (EACC) for 13 years after the watershed 1974 NBCWA. As Justice O'Connor stated in the plurality opinion, the Commissioner could not justify imposing Coal Act liability on Eastern based on Eastern's continued ownership of its subsidiary, EACC, because "the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed, while EACC would be assigned the responsibility for any miners that it had employed." *Id.* at 530. As in *Eastern*, the liability the Commissioner assigned to Petitioners arises solely from pre-1964 employment by super-reachback companies that did not sign the landmark 1974 agreement, not from employment by companies that signed a 1974 or later NBCWA.

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[10] When the Commissioner voided assignments to at least 122 super-reachback operators in response to *Eastern*, she did not consider such factors as the total amount of the operator's liability, the operator's ability to pay, or whether, prior to July 20, 1992, the operator had extensive corporate relationships with companies that had signed the 1974 or later agreements. Indeed, the *only* "fact" that animated the Commissioner's decision to affirm Petitioners' assignments was her determination that, on July 20, 1992, Petitioners were related to a company that had signed a 1974 (or later) NBCWA. If Petitioners are correct that having a corporate relationship to a 1974 signatory on July 20, 1992 does not supply a material fact sufficient to remove their situation from the ambit of the plurality's Takings analysis, and Justice Kennedy's Due Process analysis, then the Commissioner's refusal to void Petitioners' assignments necessarily violates section 706 of the APA because it is arbitrary, capricious, an abuse of discretion, not in accordance with law, and contrary to constitutional right.

2. It is irrelevant to the constitutional question that Petitioners are related to companies that signed the 1974 coal wage agreement.

In considering whether Petitioners are substantially identical to Eastern, the Fourth Circuit recognized that none of them signed or operated under the 1974 or subsequent NBCWAs. App. A-23. It did not end the analysis there, however. Having decided that the critical fact with regard to application of *Eastern* is whether the employer of the miners signed a 1974 or later NBCWA, the court then determined that, in performing the constitutional analysis under the "substantially identical" test, it must consider the Coal Act's related person provisions in determining the employer's signatory status. *Id.* Significantly, the court premised its analysis only on whether Petitioners had a corporate relationship with a 1974 signatory on July 20, 1992, not whether they maintained this corporate connection longer than the thirteen years Eastern maintained its corporate connection to EACC (1974-87). App. A-24-26.

Under the panel majority's analysis, there is no constitutional bar to imposing liability on a super-reachback for its former employees' benefits provided that the super-reachback was related to a 1974 signatory on July 20, 1992. This result follows even though that relationship may not have come into existence until July 1, 1992. In other words, whereas Eastern's ownership of EACC from 1974 to 1987 did not establish a factual connection sufficient to overcome the majority's constitutional concerns, those concerns would have been laid to rest if Eastern had owned EACC during the month of July 1992. Recasting the "substantially identical" test to go beyond the critical facts which compelled the plurality and Justice Kennedy's finding of unconstitutionality led the panel majority to wrongly exclude Petitioners from application of the Court's holding in *Eastern* that liability may not be imposed on a pre-1974 signatory for miners it employed under pre-1974 coal wage agreements.

The panel majority, relying on a statement in the *Eastern* plurality opinion to justify its application of the "substantially identical" test through the lens of the related person definition, observed:

> The plurality [in *Eastern*] acknowledged that, because Eastern sold EACC prior to July 20, 1992, "the Act assign[ed] Eastern responsibility [only] for benefits relating to miners that Eastern itself, not EACC, employed." *Eastern Enters.*, 524 U.S. at 530. The plurality thus found that "Eastern's liability under the Act bears no relationship to its ownership of EACC." And accordingly, the plurality examined Eastern's experience in isolation. *Id.*

App. A-25. The court interpreted these statements to mean that the *Eastern* plurality "expressly deferred to the delineation of entities that Congress chose to make in the Coal Act." *Id.* However, these statements appear in the context of the plurality's discussion of Eastern's conduct vis-à-vis the predecessor funds and, specifically, the fact that Eastern itself did not participate in the agreements in which lifetime health benefits were promised, although its wholly-owned subsidiary EACC did. With these statements, the plurality emphasizes that Eastern's challenge does not involve assignments based on employment with post-1974 signatory EACC.[11]

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[11] In this regard it is important to note that Petitioners are not challenging the constitutionality of "related person" liability. For purposes of this case, Petitioners acknowledge that where liability is properly assigned to an operator that signed a 1974 (or later) coal wage agreement, that liability may also be imposed on non-employers based on their statutory status as a "related person" to the 1974 signatory. It is quite a different thing, however, to say that liability which cannot be imposed on a pre-1974 signatory under the Court's holding in *Eastern* can, by operation of the related person definition, be laundered of its unconstitutionality.

Nowhere does the plurality opinion or Justice Kennedy's concurrence even imply that Eastern's assignments might have been constitutional if Congress had only established the date for determining statutory related person status prior to Eastern's sale of EACC in 1987. Having misconstrued the plurality's comment as direction to take into account related person liability in considering application of the *Eastern* precedent, the panel majority then misread the Coal Act as mandating that the 1974 signatory status of certain of Petitioners' related persons be attributed to Petitioners. The court determined that it was to treat Petitioners as though they were a single employer with their related persons and thus as if they were all 1974 signatory operators.[12] App. A-11-12, A-23-26.

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[12] Congress did not intend for "related person" status to turn a non-signatory "related person" (like A.T. Massey) into a signatory; nor to turn a pre-1974 signatory (such as TCC) into a 1974 signatory. The related person provision exists to make non-employers liable for a signatory operator's Coal Act retiree obligations where that operator is defunct, or otherwise fails to honor its constitutionally enforceable obligations. For purposes of assigning related person liability it is immaterial whether the "related person" was signatory to a coal wage agreement, or was ever in the coal business at all. Related person liability is necessarily derivative in nature. Therefore, if it would be unconstitutional to impose liability on the signatory employer in the first instance, then the related person definition cannot suffice to make it constitutional to impose that liability on a non-employer affiliate.

No provision in the Coal Act authorizes the Commissioner or a court to impute one entity's signing of the 1974 NBCWA to another entity. The related person definition set forth in 26 U.S.C. § 9701(c)(2) simply describes the three types of corporate relationships that will establish related person liability and the date for identifying when the existence of the common ownership relationship will result in affixing liability on the non-employer related person. The panel majority placed significance on section 9706(b)(1)(A) of the Act, which instructs SSA to aggregate (i.e., add together) periods of employment for purposes of making assignments where a miner worked under a wage agreement for more than one related person. App. A-23-24. However, this section simply directs the Commissioner to aggregate a retiree's service among related companies for purposes of determining which of the assignment criteria in section 9706(a) applies for purposes of allocating the retiree to a specific former employer. It does not direct the Commissioner to attribute to a related person the signatory status of the retiree's employer.

Since the Coal Act defines "related person" to consist of controlled group members such as parent-subsidiary, *see* 26 U.S.C. § 9701(c)(2)(A)(i), Eastern and EACC also satisfied the corporate relationship portion of the statutory related person definition through 1987. However, this factual connection to a 1974 signatory was not enough to save the Act from Eastern's as-applied constitutional challenge. That corporate connection simply could not cure the constitutional infirmities of the extreme retroactivity that concerned the majority in *Eastern*. It is simply implausible to conclude (as the panel majority did implicitly) that the plurality or Justice Kennedy would have reached a different conclusion concerning the constitutionality of Eastern's liability had Eastern reacquired EACC (or some other 1974 signatory company) on July 1, 1992.

Imposition of liability on an employer that did not sign the 1974 coal wage agreement is what the Supreme Court specifically held to be unconstitutional in *Eastern*. Petitioners' "related person" status to a 1974 signatory on July 20, 1992 can have no greater bearing on the constitutionality of such assignments than did Eastern's corporate relationship to EACC from 1974 through 1987. *See* 26 U.S.C. § 9706(b)(1)(A). As the decision in *Eastern* demonstrates, a *pre*-1974 signatory employer's corporate relationship to a *post*-1974 signatory does not temper the retroactive effect of the assignments such that they pass constitutional muster.

It is easy to demonstrate that the July 20, 1992 statutory date will not carry the constitutional weight which the Fourth Circuit accorded it. Congress could as easily have set the statutory determination date in section 9701(c)(2)(B) back to December 6, 1974 (the effective date of the 1974 NBCWA). Moving the statutory date would not have affected the Court's constitutional retroactivity analysis, however, because Eastern and EACC were, *in fact*, related persons on December 6, 1974. A statutory definition

which does nothing more than reconfirm a corporate relationship that already existed could not possibly have altered the constitutional analysis in the plurality opinion or Justice Kennedy's concurrence. Sliding the statutory related person date backwards or forwards cannot bridge the substantive constitutional defect identified in *Eastern*, because it is the extreme retroactivity of the assignments to Eastern (and to Petitioners) which lies at the core of their unconstitutionality. The court's conclusion that a statutory provision defining when corporate relationships will have financial consequences can cure the constitutional defect identified in *Eastern* impermissibly substitutes a *statutory* measuring date (July 20, 1992) for a *constitutional* measuring date (signing the 1974 NBCWA). *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

This Court's holding in *Eastern* turned principally on the fact that the employer had not promised lifetime benefits to its UMWA miners because it did not sign the watershed 1974 coal wage agreement. *Eastern*, 524 U.S. at 535-37, 550. The same facts exist here. Like Eastern, the Petitioners did not contribute to the expectation of lifetime benefits, nor did they contribute to the financial crisis which led to the creation of a new structure for financing UMWA retiree health care. The Fourth Circuit erred when it relied on a statutory definition establishing when liability may be allocated to non-employers as the sole basis for rejecting Petitioners' position that the result in *Eastern* governs Petitioners' liability for their former employees' benefits. In so doing, the court expanded the "substantially identical" test in a manner which impermissibly restricts the reach and application of this Court's precedent.

CONCLUSION

For all of the forgoing reasons, Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 01-2155

A. T. MASSEY COAL COMPANY, INC.;
MASSEY COAL SERVICES, INCORPORATED;
PEERLESS EAGLE COAL COMPANY;
TENNESSEE CONSOLIDATED COAL COMPANY;
RAWL SALES AND PROCESSING COMPANY;
OMAR MINING COMPANY; PM CHARLES COAL
COMPANY; ROCKY HOLLOW COAL CO;
SPROUSE CREEK PROCESSING COMPANY;
BIG BEAR MINING COMPANY;
DEHUE COAL COMPANY;
DOUGLAS POCAHONTAS COAL CORPORATION;
HOPKINS CREEK COAL; JOBONER COAL COMPANY;
MAJESTIC MINING, INCORPORATED;
PERFORMANCE COAL COMPANY;
VANTAGE MINING COMPANY;
RUSSELL FORK COAL COMPANY;
VESTA MINING COMPANY,

Plaintiffs and Counterclaim Defendants-Appellants,

and

BELFRY COAL CORPORATION,
Plaintiff,

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O. S. RAND; ELLIOTT A. SEGAL; CARL E. VAN HORN; GAIL R. WILENSKY, Trustees of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND,

Defendants-Appellees,

and

TRACE FORK COAL COMPANY; GOALS COAL COMPANY; GREEN VALLEY COAL COMPANY; LICK BRANCH COAL COMPANY; EAGLE ENERGY, INCORPORATED; POWER MOUNTAIN COAL COMPANY; WILLIAMS MOUNTAIN COAL COMPANY,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-99-83)

Argued: April 3, 2002
Decided: September 18, 2002
[Entered: September 18, 2002]

Before NIEMEYER, KING, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Gregory joined. Judge Niemeyer wrote an opinion concurring in part in the judgment and dissenting in part.

COUNSEL

ARGUED: John Ray Woodrum, HEENAN, ALTHEN & ROLES, L.L.P., Washington, D.C., for Appellants. Peter Buscemi, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, D.C.; Sharon Swingle, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Margaret S. Lopez, HEENAN, ALTHEN & ROLES, L.L.P., Washington, D.C.; John M. Poma, A.T. MASSEY COAL COMPANY, INC., Richmond, Virginia, for Appellants. Stanley F. Lechner, Charles P. Groppe, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, D.C.; Samuel M. Brock, III, TROUTMAN, SANDERS, MAYS & VALENTINE, Richmond, Virginia; John R. Mooney, Marilyn A. Baker, MOONEY, GREEN, BAKER & SAINDON, P.C., Washington, D.C.; David W. Allen, Office of the General Counsel, UMWA HEALTH AND RETIREMENT FUNDS, Washington, D.C., for Appellees Trustees. Robert D. McCallum, Jr., Assistant Attorney General, Paul J. McNulty, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees.

OPINION
KING, Circuit Judge:

A.T. Massey Coal Company, Massey Coal Services, Peerless Eagle Coal Company, and Tennessee Consolidated Coal Company (the "Massey Plaintiffs") appeal the decision of the district court that rendered them liable for the benefits of certain beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (the "Coal Act" or the "Act"). The Massey Plaintiffs maintain that their assignments of liability are unconstitutional under the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and they assert that the assignments also violate the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (the "APA"). For the reasons explained below, we conclude that these contentions are without merit, and we affirm the district court.

I.

This proceeding arises from the efforts of Congress to alleviate a crisis in the funding of retiree health benefits that engulfed the coal industry in the late 1980s. In the wake of spiraling health care costs and declining numbers of coal operators, Congress enacted the Coal Act in 1992 to ensure that retired coal miners and their dependents (the "Beneficiaries") would receive death benefits and adequate health care (the "Benefits"). In order to pay for the Benefits, the Act established a multiemployer benefit plan known as the United Mine Workers of America Combined Benefit Fund (the "Combined Fund"). The Combined Fund is financed by annual premiums assessed against current and former coal operators. It utilizes a complex administrative process to assign liability for Benefits to the operator most clearly connected to a coal miner's employment in the coal industry. The Act places the responsibility for administering this assignment process with the Commissioner of Social Security (the "Commissioner"), and it places the

responsibility for administering the Combined Fund with the Fund's Trustees. Pursuant to his statutory authority, the Commissioner made multiple assignments of liability. Among those assignments were several made to the Massey Plaintiffs, including the assignments at issue in this appeal. Certain entities challenged the efforts of the Commissioner and the Combined Fund to impose liability on them for Benefits due under the Coal Act. In 1998, the Supreme Court overturned the Commissioner's assignments of liability to one former operator, Eastern Enterprises ("Eastern"). *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). The Court, however, was unable to agree upon the rationale for its ruling: a four-justice plurality voted to invalidate the assignments on one constitutional theory, while Justice Kennedy voted to invalidate the assignments on an alternate constitutional basis.

Certain entities challenged the efforts of the Commissioner and the Combined Fund to impose liability on them for Benefits due under the Coal Act. In 1998, the Supreme Court overturned the Commissioner's assignments of liability to one former operator, Eastern Enterprises ("Eastern"). *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). The Court, however, was unable to agree upon the rationale for its ruling: a four-justice plurality voted to invalidate the assignments on one constitutional theory, while Justice Kennedy voted to invalidate the assignments on an alternate constitutional basis.

Following the decision in *Eastern Enterprises*, the Commissioner voided several assignments to coal operators that he deemed to be similarly situated to Eastern. The Commissioner did not find the Massey Plaintiffs to be similarly situated, however, and he declined to void the assignments he had earlier made to them. The Massey Plaintiffs then formally requested that certain of their assignments (the "Massey Assignments") be voided, but the Commissioner denied their requests.

In January 1999, the Massey Plaintiffs initiated this suit in the Eastern District of Virginia against the Commissioner, the Combined Fund, and the Fund's Trustees. They contended that the Massey Assignments violate the Takings and Due Process Clauses of the Fifth Amendment, as well as certain provisions of the APA. On cross-motions for summary judgment, the district court, on July 19, 2001, ruled in favor of the defendants, concluding that the Massey Assignments did not contravene the Court's holding in *Eastern Enterprises. A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp. 2d 813 (E.D. Va. 2001).

II.

The events leading to the enactment of the Coal Act have been well chronicled by this and several other courts. *See generally Eastern Enters. v. Apfel*, 524 U.S. 498, 504-16 (1998); *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 294-96 (4th Cir. 2000), *aff'd sub nom. Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 600-02 (4th Cir. 1999); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 164-65 (3d Cir. 1999); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1127-28 (4th Cir. 1996). We therefore only briefly summarize the Act's history.

A.

In 1946, the United Mine Workers of America (the "UMWA") staged a nationwide strike in an effort to secure better health and retirement benefits for its membership. In response, President Truman nationalized the coal mines, and his Secretary of the Interior entered into negotiations with UMWA President John L. Lewis. These negotiations culminated in the historic Krug-Lewis Agreement, which ended the strike and led to the creation of benefit trusts. These benefit trusts were financed by coal production royalties and by payroll deductions. They provided death, disability, retirement, and health benefits for coal miners and their dependents.

Shortly after the Krug-Lewis Agreement, the coal mines were returned to private control, and the UMWA and a multiemployer group of coal operators entered into the National Bituminous Coal Wage Agreement of 1947 (the "1947 NBCWA"). The 1947 NBCWA established the United Mine Workers of America Welfare and Retirement Fund (the "1947 Fund"), which was modeled on the Krug-Lewis benefit trusts. The 1947 Fund was financed exclusively by royalties from coal production, and it provided both pension and health benefits to coal miners and their dependents. The 1947 NBCWA failed to guarantee coal miners any specific benefits, leaving the determination of benefit levels to three trustees of the 1947 Fund.

The acrimony between the UMWA and the coal operators over benefits persisted, however, and in 1950 the UMWA and the coal operators executed a new agreement (the "1950 NBCWA"). The 1950 NBCWA replaced the 1947 Fund with a new fund financed by a perton royalty on coal production (the "1950 Fund"). The 1950 Fund mirrored the 1947 Fund in that it failed to guarantee coal miners any vested benefits, instead leaving the power to adjust or even terminate benefits with the Fund's trustees. Like its predecessor, the 1950 Fund operated on a pay-as-you-go basis, with the trustees adjusting benefit levels to fit budgetary constraints. As such, the 1950 NBCWA provided no guarantee of lifetime benefits to miners.

Although the 1950 NBCWA was amended several times, its structure remained essentially unchanged until 1974. A combination of demographic trends, which had increased the cost of benefits, and the passage of the Employee Retirement Income Security Act ("ERISA"), led in 1974 to the replacement of the 1950 Fund. The UMWA and the Bituminous Coal Operators' Association ("BCOA") entered into a new agreement, the 1974 NBCWA. This agreement replaced the 1950 Fund with four new trusts, financed by a combination of coal production royalties and

premiums based on hours worked by coal miners.[11] Two of these new trusts, the UMWA 1950 Benefit Plan and Trust (the "1950 Benefit Plan") and the UMWA 1974 Benefit Plan and Trust the "1974 Benefit Plan"), provided health benefits for miners.[2] The 1950 Benefit Plan covered coal miners who were already retired, or who retired prior to January 1, 1976, as well as their dependents, while the 1974 Benefit Plan covered coal miners who retired on or after January 1, 1976, as well as their dependents.

The 1974 NBCWA constituted a significant break from the past in that it was the first agreement between the UMWA and the BCOA to provide lifetime health benefits for retirees and their widows (unless a widow remarried). As such, the 1974 NBCWA vastly expanded benefit costs. That increase in payable benefits, combined with other factors (e.g., a decline in coal production, a rise in miner retirements, and the growth of health care costs) caused the 1950 and 1974 Benefit Plans to encounter financial problems. These problems led to the creation of the 1978 NBCWA, which rendered each employer who signed the agreement individually responsible for providing health care benefits for its own active and retired employees. The 1950 and 1974 Benefit Plans, which were to be financed by the coal operators who were party to the 1978 NBCWA, thereafter covered only "orphaned retirees," i.e., retired miners whose employers either had ceased coal mining operations or were no longer party to the NBCWAs. [3] The 1978 NBCWA

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1 In 1951, a large number of coal operators organized themselves into the BCOA, which became the primary representative of coal operators in negotiations with the UMWA.

2 The 1950 Benefit Plan and 1974 Benefit Plan did not cover pension benefits. The 1974 NBCWA established a separate funding plan for pensions.

3 Put simply, orphaned retirees were miners whose employers had left the unionized coal mining industry, either because they no longer mined coal or because they had commenced non-union coal mining operations.

represented a shift in coal operator liability from a "defined contribution" obligation, under which operators were responsible for the payment of production royalties, to a "defined benefit" obligation, under which such operators were obliged to provide sufficient monies to maintain specific benefits.

Despite the changes wrought by the 1978 NBCWA, the 1950 and 1974 Benefit Plans continued to encounter financial problems as costs increased and operators continued to leave the coal mining business. Although additional NBCWAs were agreed to and executed during the 1980s in attempts to address these financial difficulties, they failed to render the 1950 and 1974 Benefit Plans financially viable. In 1989, the threat of insolvency in the 1950 and 1974 Benefit Plans led the UMWA to call a contentious and lengthy strike against the Pittston Coal Company, which was settled only after the Secretary of Labor intervened. As part of that settlement, the federal government formed the Advisory Commission on United Mine Workers of America Retiree Health Benefits. This Commission prepared a report that formulated multiple legislative solutions to the financial problems racking the 1950 and 1974 Benefit Plans, and its recommendations formed the basis for the Coal Act.

B.

Under the Coal Act, the 1950 and 1974 Benefit Plans were merged into the newly created Combined Fund.[4] 26 U.S.C. § 9702(a). The Combined Fund was designed to provide health and death benefits to certain miners and their dependents (i.e., the Beneficiaries) who, prior to July

[4] The Coal Act also established the 1992 UMWA Benefit Plan, which covers certain coal miners and their dependents who are not eligible for benefits from the Combined Fund. 26 U.S.C. § 9712(b). In addition, the Act mandates the continuation of the individual health plans maintained by signatory operators to the 1978 and subsequent NBCWAs. 26 U.S.C. § 9711. These provisions are not at issue in this appeal.

20, 1992, had been receiving or were eligible to receive benefits under the 1950 and 1974 Benefit Plans.[5] 26 U.S.C. §§ 9703(a), (b), (c), & (f). The Combined Fund is financed by annual premiums assessed against "signatory operators," i.e., coal operators who have signed a coal wage agreement,[6] including those signatory operators who are no longer in the coal business. 26 U.S.C. §§ 9701(b)(1), (b)(3), & (c)(1). Those premiums are calculated on the basis of the number of eligible Beneficiaries assigned to a particular operator. 26 U.S.C. §§ 9703(f) & 9704. As we have noted, the responsibility for the assignment of Beneficiaries rests with the Commissioner of Social Security. 26 U.S.C. § 9706(a).[7]

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[5] As such, the Combined Fund provides Benefits only for retired miners who worked under an NBCWA and for those miners' eligible dependents.

[6] A coal wage agreement is either an NBCWA or another agreement that bound the operator to the terms of a prevailing NBCWA.

[7] The assignment provision of the Coal Act, found at § 9706(a) of Title 26, provides in relevant part as follows:

> [T]he Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or related person with respect to which) remains in business in the following order:
> (1) First, to the signatory operator which –
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

The Coal Act contemplates the possibility that, by engaging in creative corporate restructuring, a signatory operator might avoid its liability. *See* 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) (Conference Committee Report). In order to preclude such avoidance, the Act designates certain closely related entities as "related persons," and it treats those entities for purposes of Combined Fund liability as though they were a single employer. *See* 26 U.S.C. § 9706(b)(1)(A). Furthermore, the Coal Act subjects related persons to joint and several liability for a signatory operator's premiums. 26 U.S.C. § 9704(a).

Under the Act, "[a] person shall be considered to be a related person to a signatory operator if that person is . . . a member of the controlled group of corporations . . . which includes such signatory operator; . . . [or] a successor in interest to any [such] person." 26 U.S.C. § 9701(c)(2). The Act spells out three types of corporate relationships that constitute a "controlled group of corporations." The relevant relationship for our purposes is known as a "parent-subsidiary controlled group." 26 U.S.C. § 1563(a)(1).[8] Whether a corporate entity is a "related person" to a signatory operator is determined by that entity's relationship to the signatory operator as of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B).

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[8] Section 1563(a)(1) of Title 26 defines the parent-subsidiary controlled group as follows:

> (1) *Parent-subsidiary controlled group.* — One or more chains of corporations are connected through stock ownership with a common parent corporation if —
>
> (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except for the common parent corporation, is owned . . . by one or more of the other corporations; and
>
> (B) the common parent corporation owns . . . stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations . . . .

Thus, under the "related person" provision of the Coal Act, corporations that have never signed an NBCWA, as well as those that have never taken part in the mining industry, may be liable for Benefits. In effect, the Coal Act treats the corporate family as a single employer for the purpose of assigning liability for Benefits. In fact, the Act specifically provides, in 26 U.S.C. § 9706(b)(1)(A), that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator."

C.

The lead plaintiff here, A.T. Massey Coal Company ("A.T. Massey") is the parent of several wholly owned corporate subsidiaries, including the other Massey Plaintiffs,[9] that are engaged in coal mining operations. *See A.T. Massey Coal Co. v. Int'l Union, UMWA*, 799 F.2d 142, 144 (4th Cir. 1986) (observing that A.T. Massey and its affiliates function as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters"). The Massey Plaintiffs have stipulated that the Massey corporate family (the "Massey Group"), of which they are a part, constitutes a "controlled group of corporations" within the meaning of the Coal Act, and that the corporations within the Massey Group are therefore "related persons." Thus, each Massey Plaintiff is a "related person" with respect to each of the other three Plaintiffs, as well as to a host of other coal operators within the Massey Group, such as Omar Mining Company ("Omar Mining"), Sprouse Creek Processing

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[9] The other three Massey Plaintiffs are: Massey Coal Services, Inc. ("Massey Coal Services"), Peerless Eagle Coal Company ("Peerless Eagle"), and Tennessee Consolidated Coal Company ("Tennessee Consolidated").

Company ("Sprouse Creek"), and Big Bear Mining Company ("Big Bear").[10]

Pursuant to the assignment provisions of the Coal Act, specifically 26 U.S.C. § 9706(a)(3), the Commissioner made the Massey Assignments under challenge here. The Commissioner assigned A.T. Massey liability for eighty-two retired coal miners, based on its relationship as the parent of Ben Creek Coal Company ("Ben Creek") and Ben Creek's corporate predecessors (Merrill Coal Company, Gay Mining Company, and Massey Coal Mining Company). The Commissioner similarly assigned Massey Coal Services liability for two retired coal miners, based on its relationship to Ben Creek. Peerless Eagle was assigned liability for a total of forty-five retired coal miners who had worked for Peters Creek Coal Company, which merged with Peerless Eagle in 1962. Finally, the Commissioner assigned liability to Tennessee Consolidated for 204 retired coal miners that it had directly employed.[11]

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[10] In addition to Omar Mining, Sprouse Creek, and Big Bear, other members of the Massey Group include appellants PM Charles Coal Company; Rocky Hollow Coal Company; Dehue Coal Company; Douglas Pocahontas Coal Corporation; Hopkins Creek Coal Company; Joboner Coal Company; Majestic Mining, Incorporated; Performance Coal Company; Vantage Mining Company; Russell Fork Coal Company; and Vesta Mining Company.

[11] In many instances, the Commissioner assigned liability to the Massey Plaintiffs for the Benefits of coal miners who were deceased when the Combined Fund began providing benefits in February 1993. In such cases, no premiums were assessed against the Massey Plaintiffs; those assignments were made to demonstrate the basis on which a coal miner's eligible dependents were assigned to the Massey Plaintiffs. Moreover, the number of beneficiaries for whom premiums have been assessed has declined due to mortalities occurring since 1993. Thus, by 1999 – the most recent plan year for which the parties have provided data – A.T. Massey was responsible for 30 beneficiaries, Massey Coal Services for 2 beneficiaries, Peerless Eagle for 22 beneficiaries, and Tennessee Consolidated for 80 beneficiaries.

Among the Massey Plaintiffs, only Tennessee Consolidated has signed an NBCWA, last doing so in 1960. Other members of the Massey Group, however, signed the 1974 or subsequent NBCWAs, such as Omar Mining (which signed the 1974, 1978, 1981, and 1984 NBCWAs), Sprouse Creek (which signed the 1974, 1978, and 1981 NBCWAs), and Big Bear (which signed the 1978 and 1981 NBCWAs).

D.

After its enactment, the Coal Act was challenged in various judicial proceedings. Although many of these legal assaults were unsuccessful, a notable exception was a lawsuit brought by Eastern Enterprises ("Eastern") in the District of Massachusetts. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Supreme Court held that the Coal Act, as applied to Eastern, was unconstitutional.

Eastern was a coal operator that had been in the coal mining business from 1929 until 1965. It had signed every NBCWA between 1947 and 1964. In 1965, Eastern transferred its coal mining operations to a wholly owned subsidiary, Eastern Associated Coal Corporation ("EACC"), and it then withdrew from active involvement in the coal industry. EACC thereafter signed several subsequent NBCWAs, including the 1974, 1978, and 1988 agreements. In 1987, Eastern sold its interest in EACC, and it thereafter had no connection to the coal mining industry. After enactment of the Coal Act, the Commissioner, pursuant to 26 U.S.C. § 9706(a)(3), assigned liability to Eastern for over a thousand retired miners whom it had employed prior to its departure from the coal mining industry in 1965. These assignments made Eastern liable for payments to the Combined Fund of more than fifty million dollars. Eastern brought suit against the Commissioner, challenging these assignments and contending that they violated the Takings and Due Process Clauses of the Fifth Amendment.

Although a majority of the Court upheld Eastern's challenge to the assignments, the Court offered no unified rationale for its holding. Justice O'Connor, writing for herself, Chief Justice Rehnquist, and Justices Scalia and Thomas, concluded that the Coal Act's assignments of liability to Eastern represented an unconstitutional taking. *Eastern Enters.*, 524 U.S. at 537-38. This plurality of the Court observed that economic legislation may be unconstitutional if "it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 52829. The plurality opinion observed that the Coal Act required Eastern to pay premiums to ensure that beneficiaries possessed benefits for life, and that such lifetime benefits were not part of any coal wage agreements prior to the 1974 NBCWA. *Id.* at 535. Because Eastern had left the coal mining business in 1965, the plurality concluded that the Act imposed "such a disproportionate and severely retroactive burden upon Eastern," that its assignments were unconstitutional under the Takings Clause. *Id.* at 536-38.

Justice Kennedy, who provided the fifth vote for invalidation of the Eastern assignments, explicitly rejected the plurality's Takings Clause analysis, and he instead concluded that the Coal Act, as applied to Eastern, violated the Due Process Clause. *Id.* at 546-50 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy maintained that "retroactive laws of great severity" could contravene due process, and that such retroactive legislation is particularly problematic when it is not being used to remedy a past wrong. *Id.* at 549. He observed that the assignments to Eastern had a "retroactive effect of unprecedented scope," in that they reached back over thirty years. *Id.* According to Justice Kennedy, Eastern's departure from the coal mining industry prior to the 1974 NBCWA meant that it had played no role in the fiscal crisis that engulfed the industry in the 1970s and

1980s. *Id.* As such, he concluded that the Commissioner's assignments of liability to Eastern could in no way be viewed as a remedy for Eastern's past conduct, and that the assignments thus contravened due process.[12] *Id.*

E.

In the wake of the *Eastern Enterprises* decision, the Commissioner voided several assignments to coal operators that he deemed "similarly situated" to Eastern. He declined, however, to void the Massey Assignments, even though those assignments were for coal miners who had worked, prior to the 1974 NBCWA, for coal operators who had not signed the 1974 or any subsequent NBCWA. The Commissioner concluded that the Massey Assignments were proper because the Massey Plaintiffs are part of a "controlled group" of corporations, as defined in 26 U.S.C. § 1563(a)(1), that include several signatories to the 1974 NBCWA or subsequent NBCWAs.

In January 1999, the Massey Plaintiffs brought suit against the Commissioner, the Combined Fund, and the Fund's Trustees, contending that the Massey Assignments violated both the Constitution – specifically the Takings and Due Process Clauses of the Fifth Amendment – and the

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12 The four dissenting Justices, with Justice Breyer authoring the primary dissenting opinion, concluded that Eastern's assignments did not violate any Fifth Amendment guarantees. *Eastern Enters.*, 524 U.S. at 565-67 (Breyer, J., dissenting). Like Justice Kennedy, the dissenters expressly rejected the plurality's Takings Clause analysis. *Id.* at 554. Thus, the Court voted five-four that the Eastern assignments were not an unconstitutional taking. However, the four dissenters also expressly rejected Justice Kennedy's conclusion that the assignments violated due process. Hence, with the plurality declining to address that issue, only one Justice (Justice Kennedy) subscribed to the notion that the Eastern assignments violated due process. As a result, there was no single constitutional theory under which a majority of the Justices agreed that the Eastern assignments were unconstitutional.

APA.[13] By their complaint, the Massey Plaintiffs sought a refund from the Combined Fund of the premiums they had paid as a result of the Massey Assignments. In response, the Combined Fund and its Trustees filed counterclaims against the Massey Plaintiffs and other members of the Massey Group, i.e., other companies under the common ownership or control of A.T. Massey.[14] The counterclaimants sought a declaratory judgment that the Coal Act, as applied to the Massey Plaintiffs and the other counterclaim defendants, violates neither the Takings nor Due Process Clause; and they sought an injunction requiring the counterclaim defendants to pay the premiums due the Combined Fund under the Act.

By its opinion of July 19, 2001, the district court awarded summary judgment to the Commissioner, the Combined Fund, and the Fund's Trustees, concluding that the Massey Assignments did not contravene the Court's holding in *Eastern Enterprises. A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp. 2d 813 (E.D. Va. 2001). The district court, however, denied the counterclaims of the Combined Fund and its Trustees.[15] The Massey Plaintiffs and the other counterclaim defendants have appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

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[13] A fifth Massey company, Belfry Coal Corporation ("Belfry"), was also a plaintiff in the district court. On April 28, 2000, the Commissioner declared void the assignments challenged by Belfry. Belfry's claims against the Commissioner and the Combined Fund are therefore moot, and Belfry is not a party to this appeal.

[14] The Commissioner filed a separate answer to the complaint, and he did not assert any counterclaims.

[15] In light of the district court's decision, the parties entered into a stipulation, dated August 22, 2001, under which the Massey Plaintiffs agreed to pay all premiums assessed by the Combined Fund plus interest, while the Combined Fund agreed to issue an appropriate refund if the Massey Plaintiffs prevailed at a later date. The district court then amended its opinion to account for the stipulation. *A.T. Massey Coal Co., Inc. v. Massanari*, CA No. 3:99cv83, Order (E.D. Va. Aug. 28, 2001).

III.

The parties agree that the material facts of this case are not in dispute. They also agree that this appeal involves only questions of law. Under controlling authority, we review the district court's award of summary judgment de novo. *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001).

IV.

Although the Massey Plaintiffs assert that the Massey Assignments violate both the Constitution and the APA, their appeal turns on a single issue – whether those assignments are unconstitutional under *Eastern Enterprises*.[16] Before we can evaluate this question, however, we must first ascertain the holding of *Eastern Enterprises*.

A.

It is well established, under *Marks v. United States*, 430 U.S. 188 (1977), that when a decision of the Court lacks a majority opinion, the opinion of the Justices concurring in the judgment on the "narrowest grounds" is to be regarded as the Court's holding. 430 U.S. 188, 193 (1977). The *Marks* rule does not apply, however, unless "the narrowest opinion represents a `common denominator of the Court's reasoning' and `embod[ies] a position implicitly approved by at least five Justices who support the judgment.'" *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C.

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16 As a final agency decision, the Commissioner's assignment of beneficiaries is governed by the APA. *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 301 (4th Cir. 2000), *aff'd sub nom. Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002). Under § 706 of the APA, the Commissioner's decision may be set aside only if it was either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity." In this case, the Massey Plaintiffs contend that the Massey Assignments must be set aside because those assignments are contrary to the Court's holding in *Eastern Enterprises*. Therefore, in deciding the constitutional issue, we also dispose of the Massey Plaintiffs' APA claim.

Cir. 1998) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)). In *Eastern Enterprises*, Justice Kennedy specifically rejected the plurality opinion's reliance on Takings Clause jurisprudence, and he instead based his conclusion on a due process theory that the plurality expressly declined to address. *Compare Eastern Enters. v. Apfel*, 524 U.S. 498, 537-38 (1998) ("Because we have determined that the [Coal Act] violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim."), *with id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part) ("I concur in the judgment holding the Coal Act unconstitutional but disagree with the plurality's Takings Clause analysis, which, it is submitted, is incorrect."). Our analysis of the two opinions finds no theoretical overlap between the rationales employed by the plurality and Justice Kennedy; as such, "Justice Kennedy's substantive due process reasoning is not a `narrower' ground that we might take to constitute the controlling holding." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658 (3d Cir. 1999); *see also Association of Bituminous Contractors*, 156 F.3d at 1254-55. Thus, consistent with the other courts that have analyzed this question, we conclude that *Eastern Enterprises* "mandates judgment for . . . plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence."[17] *Unity Real*

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[17] We note that *Eastern Enterprises* does not stand for the legal proposition that the Eastern assignments under the Coal Act contravene the Takings Clause. As the district court properly observed, "it is clear that [a] majority of the Court [in *Eastern Enterprises*, i.e., Justice Kennedy and the four dissenters] believed that the Coal Act, and its assessment of premiums, did not constitute a taking within the ambit of the Fifth Amendment." *A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp. 2d 813, 825 (E.D. Va. 2001); *see also Unity Real Estate*, 178 F.3d at 659 ("[W]e are bound to follow the five-four vote against the takings claim in *Eastern*."). Nor can *Eastern* stand for the proposition that the Eastern assignments are unconstitutional under the Due Process Clause, because only Justice Kennedy arrived at such a conclusion. It is this absence of consensus on the part of the Court that prompts us to apply *Eastern Enterprises* only to coal operators that stand in a position substantially identical to that of Eastern.

Estate, 178 F.3d at 659; *see also Association of Bituminous Contractors*, 156 F.3d at 1254-55.

Therefore, in order to determine whether the Massey Plaintiffs may constitutionally be subjected to liability for the Massey Assignments, we must determine what it means to be in a position "substantially identical" to that of Eastern. In so doing, we must identify and examine the factors that were critical to both the plurality and Justice Kennedy in their respective determinations that the Commissioner's assignments to Eastern were unconstitutional. The Massey Plaintiffs are only entitled to succeed here if their position, with respect to every critical factor, is substantially identical to that of Eastern. As explained below, our assessment of the plurality opinion of JusticeO'Connor and the separate concurring opinion of Justice Kennedy leads us to conclude that a coal operator stands in a position "substantially identical" to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs. *See Unity Real Estate*, 178 F.3d at 659 (observing that "[l]anguage in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974" indicates that connection to 1974 and subsequent NBCWAs is a critical factor).

1.

Justice O'Connor's plurality opinion emphasized that the magnitude of Eastern's retroactive liability was severely disproportionate to the conduct giving rise to that liability. The plurality observed that, while Congress has "considerable leeway to fashion economic legislation," and that it may impose retroactive liability under certain circumstances, an economic regulation may nonetheless constitute an impermissible taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties'

experience." *Eastern Enters.*, 524 U.S. at 528-29. Applying that observation to Eastern, the plurality noted that it was the 1974 NBCWA that "first suggest[ed] an industry commitment to the funding of lifetime health benefits for both retirees and their family members." *Id.* at 530-31. Accordingly, "[n]ot until 1974 . . . could lifetime medical benefits under the multiemployer agreement have been viewed as promised." *Id.* at 535.

Eastern, though, had left the coal industry in 1965, and it had been party only to NBCWAs that promised unvested benefits, fully subject to later alteration and termination. *Id.* at 529-32. The plurality dismissed as irrelevant the fact that Eastern's wholly owned subsidiary, EACC, was party to the 1974 expanded benefits regime, and that EACC continued mining coal until 1987. The plurality maintained that "Eastern's liability under the Act bears no relationship to its ownership of EACC." *Id.* at 530. "[T]he Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed." *Id.* Because the Act grounded Eastern's liability exclusively in Eastern's own conduct, the plurality assessed the constitutionality of Eastern's liability on the same terms. Given Eastern's particular, pre-1974 experience and its expectations in the coal mining industry, the plurality reasoned that the retroactive liability to which Eastern had been subjected was unconstitutionally disproportionate. *Id.* at 536-38.

2.

Justice Kennedy's separate opinion similarly relies on the fact that Eastern left the coal mining industry prior to the pivotal 1974 NBCWA. Justice Kennedy, though, emphasized the unfairness of holding Eastern retroactively liable for a benefits crisis that it had not helped to precipitate. He observed that our legal tradition has long disfavored retroactive economic legislation, because such legislation "can destroy the reasonable certainty and

security which are the very objects of property ownership." *Id.* at 548 (Kennedy, J., concurring in the judgment and dissenting in part). He therefore concluded that "due process protection must be understood to incorporate our settled tradition against retroactive laws of great severity." *Id.* at 549. In defining "retroactive laws of great severity," Justice Kennedy focused on both (1) the degree of retroactive effect, i.e., how much time had passed since the conduct that gave rise to liability, and (2) whether the liability in question was remedial, in that it imposed "an actual, measurable cost of the employer's business which the employer had been able to avoid in the past." *Id.* (quotation and citation omitted).

Justice Kennedy determined that the assignments to Eastern, by creating liability for Eastern's conduct in the 1950s and 1960s, had "a retroactive effect of unprecedented scope." *Id.* at 549-50. Because such retroactive liability could be justified only if it served a remedial purpose, only those coal operators who "were responsible for [the] expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 benefit plans [created by the 1974 NBCWA]" could reasonably be held responsible for providing lifetime benefits. *Id.* at 550. Since Eastern had neither promised lifetime benefits nor precipitated the funding crises of the 1970s and 1980s, Justice Kennedy concluded that the Coal Act, as applied to Eastern, represented "one of those rare instances in which even [the] permissive standard [of the Due Process Clause] has been violated." *Id.*

3.

In sum, Eastern's pre-1974 departure from the coal industry and its status as a nonparty to the 1974 and subsequent NBCWAs were critical both to the plurality and to Justice Kennedy in their respective determinations that the Commissioner's assignments to Eastern were

unconstitutional. Consequently, the Massey Plaintiffs stand in a position "substantially identical" to that of Eastern only if they neither signed nor operated under the 1974 or subsequent NBCWAs.

B.

Having assessed what it means to be in a position "substantially identical" to that of Eastern, we turn to the question of whether the Massey Plaintiffs are so situated. As explained below, we conclude that they are not.

Under *Eastern Enterprises*, a coal operator cannot be assessed Coal Act premiums if it signed and operated only under pre-1974 NBCWAs. As such, it would initially seem that our inquiry is simply whether any of the Massey Plaintiffs signed or operated under the 1974 or subsequent NBCWAs. Because it is clear that they did not, it might appear at first glance that the experiences of the Massey Plaintiffs in the coal mining industry are "substantially identical" to those of Eastern.

Under the Coal Act, however, we are not to view the experiences of the Massey Plaintiffs in isolation; any such examination would be at odds with the Coal Act's concepts of "related persons" and "controlled groups." As discussed above, the Act provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Under this provision, each member of a controlled group of corporations, such as the Massey Group, is treated for Combined Fund liability purposes as though it had employed every miner who worked for any member of the group.[18]

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[18] The Act further emphasizes the statutory unity of the members of a controlled group by holding the members jointly and severally liable for each other's obligations under the Coal Act. 26 U.S.C. § 9704(a).

Looking beyond the terms of the statute, we find further evidence of Congress's plain intent to aggregate the members of a corporate family into a single entity for the purpose of assigning Combined Fund liability. The Conference Committee Report stated that "because of the complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations is intentionally very broad." 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) (Conference Committee Report). In essence, the Act recognizes that coal operators frequently reorganize their corporate structures and spin off or consolidate subsidiaries. Congress recognized that while those reorganizations alter corporate relationships, they leave the nature of a coal operator's involvement in the industry unchanged. Thus, the Coal Act looks beyond the corporate form, focusing on the collective experiences of a "controlled group" rather than on the particular experiences of ever-shifting member entities.

The Massey Plaintiffs contend that their related person status with respect to coal operators who signed the 1974 and subsequent NBCWAs has no bearing on whether their position is "substantially identical" to that of Eastern. They observe that Eastern's wholly owned subsidiary, EACC, operated in the coal mining business during the critical post-1974 period, and that it signed the 1974 and subsequent NBCWAs. They concede that Eastern sold EACC in 1987, and that because the Coal Act determines related person status as of July 20, 1992, Eastern and EACC are not statutory "related persons." The Massey Plaintiffs assert, however, that the fact that Eastern had no statutory "related person" is irrelevant to our constitutional inquiry. The Massey Plaintiffs point out that the July 20, 1992, statutory date for the determination of related person status represents an arbitrary choice by Congress. The key point, the Plaintiffs assert, is that the corporate relationship between Eastern and EACC in the post-1974 NBCWA

period was functionally the same as that between the Massey Plaintiffs and their related persons (such as Omar Mining and Big Bear) who, like EACC, signed the 1974 and subsequent NBCWAs. Accordingly, the Massey Plaintiffs maintain that their experiences in the coal mining industry are "substantially identical" to those of Eastern.

The Massey Plaintiffs overlook the fact that the *Eastern Enterprises* plurality expressly deferred to the delineation of entities that Congress chose to make in the Coal Act. The plurality acknowledged that, because Eastern sold EACC prior to July 20, 1992, "the Act assign[ed] Eastern responsibility [only] for benefits relating to miners that Eastern itself, not EACC, employed." *Eastern Enters.*, 524 U.S. at 530. The plurality thus found that "Eastern's liability under the Act bears no relationship to its ownership of EACC." And accordingly, the plurality examined Eastern's experience in isolation. *Id.*

Just as the *Eastern* Court deferred to Congress's statutory delineation of entities under the Coal Act, this Court likewise must take the parties as the Act defines them. The Coal Act designates Eastern, by virtue of its sale of its coal mining subsidiary prior to July 20, 1992, as a discrete entity. By contrast, the Act gathers the Massey Plaintiffs together with the other members of the Massey Group for purposes of determining Combined Fund liability. Regardless of how members of the Group might prefer to be viewed, Congress has, for our purposes, effectively designated these "related persons" as a single legal entity under the Coal Act. Consequently, in evaluating whether the Massey Plaintiffs' experiences in the coal industry are substantially identical to those of Eastern, we may not artificially segregate those plaintiffs from the other members of the Massey Group. Rather, we must analyze the experiences of the Massey Group as "related persons," i.e, as a whole.

Looking thus through the lense of the Coal Act's "related persons" framework, we find that the Massey Plaintiffs are part of an entity whose experiences in the coal mining industry are not substantially identical to those of Eastern. In *Eastern Enterprises*, the Court determined that it was unconstitutional to subject a coal operator to fifty million dollars in retroactive liability when that operator had engaged exclusively in pre-1974 coal mining activities, and when it had neither assented to, nor contributed to the foundering of, the expanded, post-1974 NBCWA retirement benefits regime. Here, we face the question of whether it is constitutional to subject to substantial liability a coal operator – the Massey Group – that has carried on coal mining activity throughout the crucial post-1974 period, and that has assented to and participated in the post-1974 NBCWA regime. Unlike Eastern, several members of the Massey Group (such as Omar Mining and Big Bear) signed the 1974 and subsequent NBCWAs. Attributing the employment experiences of those signatory operators to the rest of the Massey Group – as the Coal Act's "related person" provisions require us to do – and mindful that an operator is "substantially identical" to Eastern only if its experiences in the mining industry are confined to the pre-1974 NBCWA era, we find the position of the Massey Plaintiffs easily distinguishable from that of Eastern. Because the Massey Plaintiffs do not stand in a position "substantially identical" to that of Eastern, the Commissioner's assignments of liability to the Massey Plaintiffs are not unconstitutional under *Eastern Enterprises*.

V.

For the foregoing reasons, the challenges of the Massey Plaintiffs to the Massey Assignments are without merit, and we affirm the district court.

AFFIRMED

NIEMEYER, Circuit Judge, concurring in part in the judgment and dissenting in part:

I would find that the assignments of liability for coal workers' pensions to A.T. Massey Coal Company, Inc., Massey Coal Services, Inc., and Peerless Eagle Coal Company are unconstitutional by virtue of the Supreme Court's holding in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). With respect to those assignments, I would reverse. Otherwise, I concur in the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

A.T. MASSEY COAL COMPANY, INC., MASSEY COAL SERVICES, INC., PEERLESS EAGLE COAL CO., TENNESSEE CONSOLIDATED COAL CORPORATION,

Plaintiffs,

v. Civil Action No. 3:99cv83

Larry G. MASSANARI,
Acting Commissioner of Social Security,

and

MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, as Trustees of the United Mine Workers of America,

Defendants,

MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, as Trustees of the United Mine Workers of America,

Counterclaim Plaintiffs,

v.

A.T. MASSEY COAL COMPANY, INC., MASSEY COAL SERVICES, INC., PEERLESS EAGLE COAL CO., TENNESSEE CONSOLIDATED COAL CORP., RAWL SALES AND PROCESSING CO., OMAR MINING CO., PM CHARLES COAL CO., ROCKY HOLLOW COAL CO., SPROUSE CREEK PROCESSING CO., BIG BEAR MINING CO., DEHUE COAL CO., DOUGLAS POCAHONTAS COAL CORP., HOPKINS CREEK COAL CO., JOBONER COAL CO., MAJESTIC MINING, INC., PERFORMANCE COAL CO., VANTAGE MINING CO., RUSSELL FORK COAL CO., and VESTA MINING CO.,

Counterclaim Defendants.

[Entered: July 19, 2001]

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) pursuant to Fed. R. Civ. P. 25(d), Larry G. Massanari, Acting Commissioner of the Social Security Administration ("the Commissioner"), is hereby substituted for Defendant Kenneth S. Apfel, former Commissioner of the Social Security Administration;

(2) the Plaintiffs' Motion for Summary Judgment is DENIED;

(3) the Commissioner's Motion for Summary Judgment is GRANTED;

(4) the Counterclaim Plaintiff Trustees' Motion for Summary Judgment is DENIED; and

(5) the Complaint is dismissed with prejudice and the Counterclaims are dismissed without prejudice.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

\s\ Robert E. Payne
United States District Judge

Richmond, Virginia
Date: July 19, 2001

In The
United States District Court, E.D. Virginia,
Richmond Division.

A.T. MASSEY COAL COMPANY, INC.,
Massey Coal Services, Inc., Peerless Eagle Coal Co.,
Tennessee Consolidated Coal Corporation,
Plaintiffs,

v.

Larry G. MASSANARI,
Acting Commissioner of Social Security,

and

Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand,
Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky and
William P. Hobgood, as Trustees of the United Mine
Workers of America,
Defendants,

Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand,
Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky and
William P. Hobgood, as Trustees of the United Mine
Workers of America,
Counterclaim Plaintiffs,

v.

A.T. Massey Coal Company, Inc., Massey Coal Services,
Inc., Peerless Eagle Coal Co., Tennessee Consolidated
Coal Corporation, Rawl Sales and Processing Co., Omar
Mining Co., PM Charles Coal Co., Rocky Hollow Coal Co.,
Sprouse Creek Processing Co., Big Bear Mining Co.,
Dehue Coal Co., Douglas Pocahontas Coal Corp.,
Hopkins Creek Coal Co., Joboner Coal Co., Majestic Mining,
Inc., Performance Coal Co., Vantage Mining Co.,
Russell Fork Coal Co., and Vesta Mining Co.,
Counterclaim Defendants.

No. CIVA 3:88CV83.

[Entered: July 19, 2001]

John R. Woodrum, Heenan, Althen & Roles, Washington, D.C., John M. Poma, Esquire, A.T. Massey Coal Company, Inc., Richmond, VA, for Plaintiffs.

Debra J. Prillaman, Assistant United States Attorney, United States Attorney's Office, Richmond, Richard G. Lepley, Esquire, Brian G. Kennedy, Department of Justice, Civil Division, Washington, DC, for Massanari.

Samuel M. Brock, III, Troutman Sanders Mays & Valentine LLP, Richmond, VA, Charles P. Groppe, Peter Buscemi, Stanley F. Lechner, Morgan, Lewis & Bockius, L.L.P., David W. Allen, UMWA Health & Retirement Funds, John R. Mooney, Mooney Green, Gleason, Baker, Gibson & Saiden, PC, Washington, DC, for Trustees.

MEMORANDUM OPINION

PAYNE, District Judge.

This action involves the application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § § 9701-9722 (the "Coal Act" or the "Act"), to the plaintiff coal companies and the assessment of liability thereunder for healthcare premiums benefitting retired coal miners. The Plaintiffs in this action are: A.T. Massey Coal Company, Inc.; Massey Coal Services, Inc.; Peerless Eagle Coal Co.; and Tennessee Consolidated Coal Co. (collectively "Plaintiffs" or "Massey Plaintiffs"). [1] The Defendants are

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[1] At one point, Belfry Coal Corporation ("Belfry") was also a plaintiff in this action, however, on April 28, 2000, the SSA voided the assignments made to Belfry, thereby rendering its action against the Defendants moot.

Larry G. Massanari, Acting Commissioner of Social Security[2] and Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky, and William P. Hobgood, Trustees for the United Mine Workers of America. The Plaintiffs assert that Defendant Massanari, acting for the Social Security Administration ("SSA"), has unconstitutionally assigned to them responsibility for paying the health care premiums for certain retired coal miners, and their dependents, who previously had worked for either the Plaintiffs or their related companies. The specific assertion made by the Plaintiffs is that the decision of the Supreme Court of the United States in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) precludes the Commissioner from constitutionally assigning to the Plaintiffs the responsibility for paying these premiums.[3]

The Plaintiffs seek: (1) a declaratory judgment that the Coal Act is unconstitutional as applied to them (Count I (due process), Count II (takings)); (2) a judgment that SSA violated the Administrative Procedure Act 5 U.S.C. § 701, *et seq.*, when, pursuant to the Supreme Court's decision in *Eastern Enterprises*, it voided the assignment of Coal Act beneficiaries made to companies similarly situated to Plaintiffs, but refused to void assignments to Plaintiffs (Count III); and (3) an Order directing defendant Trustees of the United Mine Workers' Association Combined Benefit

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[2] Pursuant to Rule 25(d)(1), Mr. Massanari has been substituted for Kenneth S. Apfel, former Commissioner of the Social Security Administration.

[3] As of April 1, 1999, SSA, in compliance with the *Eastern Enterprises* decision, voided *ab initio* beneficiary assignments previously made to at least 122 coal companies that SSA deemed to be similarly situated to Eastern. Also, on April 1, 1999, SSA denied the Plaintiffs' request to void the assignments of beneficiaries to them, explaining that they are not similarly situated to the plaintiff in *Eastern Enterprises*.

Fund ("the Trustees") to return all premiums previously paid by Plaintiffs on behalf of the wrongly assigned beneficiaries (Count IV (unjust enrichment)[4] and VI (action for refund of payments under Employee Retirement Income Security Act)). [5]

In its counterclaims, the Combined Fund seeks: (1) a declaratory judgment that the Coal Act is constitutional as applied to companies like the Plaintiffs; (2) damages incurred as a result of the Plaintiffs' failure to pay the statutorily mandated premiums to the Combined Fund; and (3) injunctive relief requiring the Plaintiffs to pay the premiums and prevent the Plaintiffs from improperly disposing of corporate assets. The Combined Fund added the following related coal companies as counterclaim defendants: Rawl Sales and Processing Co., Omar Mining Co., PM Charles Coal Co., Rocky Hollow Coal Co., Sprouse Creek Processing Co., Big Bear Mining Co., Dehue Coal Co., Douglas Pocahantas Coal Corp., Hopkins Creek Coal Co., Joboner Coal Co., Majestic Mining, Inc., Performance Coal Co., Vantage Mining Co., Russell Fork Coal Co., and Vesta Mining Co.

The Plaintiffs have filed a motion for summary judgment requesting judgment as a matter of law in its their favor on their claims. The Commissioner has likewise filed a motion for summary judgment on the Plaintiffs' claims and the Trustees seek summary judgment on their counterclaims. The parties agree that the material facts are not in dispute and that the matter is appropriate for decision

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[4] Although the Plaintiffs caption Count IV in their Complaint as being directed against the Commissioner of the Social Security Administration, the substance of the count reveals that it is an allegation of unjust enrichment and a request for restitution against the Combined Fund.

[5] Inexplicably, the Complaint does not contain a Count V.

as a matter of law.[6] For the following reasons, summary judgment is granted in favor of the Defendant Commissioner on the Plaintiffs claims and summary judgment is denied on the Trustees' counterclaims.

STATEMENT OF FACTS

I. The Coal Act

A. Factual History Leading to the Enactment of the Coal Act

The history of the Coal Act is quite detailed and has been laid out comprehensively in numerous court decisions, including the *Eastern Enterprises* decision.[7] Hence, it will be recanted here but briefly. In 1946, a nationwide strike among coal miners erupted as a result of demands by the United Mine Worker's Association ("UMWA") that coal operators provide better health care benefits for their employees. *See Eastern Enterprises*, 524

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6 During the course of this litigation, SSA questioned whether, considering the decision of the United States Court of Appeals for the Fourth Circuit in *Pittston Co. v. United States*, 199 F.3d 694 (4th Cir.1999), this Court had jurisdiction over this action. The parties were directed to file briefs on the matter and the Court held resolution of the current dispute in abeyance pending the Fourth Circuit's consideration of the jurisdictional issue in *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir.2000). The parties agree that, pursuant to the decision in *Sigmon*, this Court properly has jurisdiction to decide all matters herein raised. *Id.* at 303. The Court concurs in that assessment.

7 *See Eastern Enterprises*, 524 U.S. at 504-16, 118 S.Ct. 2131; *see also Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir.2000); *Holland v. Big River Minerals Corp.*, 181 F.3d 597 (4th Cir.1999), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000), *cert. denied* 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000); *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161 (3rd Cir.1999), *cert. denied sub nom., Anker Energy Corp. v. United Mine Workers of America Combined Benefit Fund*, 528 U.S. 1003, 120 S.Ct. 496, 145 L.Ed.2d 383 (1999); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3rd Cir.1998), *cert. denied*, 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999)

U.S. at 504-05, 118 S.Ct. 2131.[8] After intervention by the federal government, the UMWA and several coal operators entered into the National Bituminous Coal Wage Agreement of 1947 ("1947 NBCWA"). *Id.* at 505, 118 S.Ct. 2131. The 1947 NBCWA established a trust fund, financed by royalties on coal produced, designed to provide pension and medical benefits to miners and their dependents. *Id.* at 505-06, 118 S.Ct. 2131.

In 1950, 1968, and 1971 new NBCWAs were adopted, each only slightly changing the terms and structure of the original agreement and providing for increases in the amount of royalties paid to the fund based on coal production. *Id.* at 506, 118 S.Ct. 2131. Essentially, under all four of those agreements, the miners and their families were never promised any specific benefits; instead the trustees of the fund had the discretion to establish and adjust the level of benefits provided. *Id.* at 506-07, 118 S.Ct. 2131. Significantly, the agreements did not guarantee lifetime health benefits for retirees or their dependents. *Id.* at 508, 118 S.Ct. 2131.

After Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, which required specific funding and vesting of pension plans, the UMWA entered into a new NBCWA with the Bituminous Coal Operators' Association ("BCOA"), a multiemployer bargaining association created in 1951 to be the primary representative of coal operators in negotiations with the UMWA. *Id.* at 509, 118 S.Ct. 2131. The 1974 NBCWA, which was funded by royalties on coal production and premiums based on hours worked by miners, created four trusts funds. *Id.* Two of the trust funds covered retiree health benefits: the 1950 Benefit Plan provided health benefits to coal workers who retired

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[8] Unless otherwise noted, all citations to *Eastern Enterprises* hereinafter refer to the plurality opinion.

before 1976 and the 1974 Benefit Plan covered those who retired on or after January 1, 1976. *Id.* The 1974 NBCWA, unlike any of its predecessors, expressly provided lifetime benefits to retirees and provided benefits to their widows until their death or remarriage. *Id.*

Soon after their creation, the 1950 and the 1974 Benefit Plans encountered financial difficulties attributable to: (i) the increased benefits provided by the 1974 NBCWA; (ii) a decline in the demand for coal; (iii) the retirement of an entire generation of miners; and (iv) the increasing costs of health care. *Id.* at 510, 118 S.Ct. 2131. In an attempt to alleviate the financial burden and in a move towards decentralization of the health-care benefit system organization, the next NBCWA, signed in 1978, ("the 1978 NBCWA") gave signatory employers the responsibility of providing health care to their own current and retired miners. *Id.* at 510, 118 S.Ct. 2131; *see also Sigmon Coal,* 226 F.3d at 295. The 1974 Benefit Plan, financed by the remaining participating coal operators, was restricted to cover only "orphaned" retirees whose former employers were no longer in business or otherwise ceased contributing to the funds. *Sigmon Coal,* 226 F.3d at 295. The 1978 NBCWA contained two provisions intended to ensure the plan's solvency: first, a "guarantee" clause requiring signatories to make sufficient contributions to maintain benefits during the agreement; and, second, an "evergreen" clause which required signatories to contribute to the fund as long as they were in the coal industry, regardless of whether they signed any subsequent agreements. *Eastern Enterprises,* 524 U.S. at 510, 118 S.Ct. 2131.

Notwithstanding this attempt to shore up the financial problems of the funds, the financial decline rapidly progressed because of increasing costs and the withdrawal of employers from the 1978 NBCWA. *Id.* To

address the problem, the federal government established an Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission"), which, after extensive studies, proposed a solution that was submitted to Congress. *Id.* at 511-12, 118 S.Ct. 2131. In the end, Congress passed the Coal Act, which was a modified version of the Coal Commission's recommendation. *Id.* at 514, 118 S.Ct. 2131.

B. The Provisions of the Coal Act

The Coal Act, *inter alia,* combined the 1950 and 1974 Benefit Plans and created a new multiemployer plan called the United Mine Workers of America Combined Benefit Fund ("Combined Fund"). *See* 26 U.S.C. § 9702(a)(2); *Eastern Enterprises,* 524 U.S. at 514, 118 S.Ct. 2131. The Combined Fund is designed to provide health and death benefits to coal industry retirees and their dependents who (1) were eligible to receive benefits from the 1950 or 1974 Benefit Plans and (2) were receiving benefits as of July 20, 1992. *See* 26 U.S.C. § 9703.[9] To finance the Combined Fund, the Act assesses annual premiums against "signatory operators," which the Act defines as coal operators who have signed any coal wage agreement.[10] *See* 26 U.S.C. § 9701(c)(1). Any signatory coal operator who "conducts or derives revenue from any business activity, whether or not in the coal industry," may be required to

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[9] The Coal Act also establishes the "1992 UMWA Benefit Plan," which provides health benefits coverage to eligible beneficiaries who are not covered by the Combined Fund. *See* 26 U.S.C. § 9712(b). Further, the Coal Act also mandates continuation of individual health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. These provisions are not at issue here.

[10] The statute defines "coal wage agreement" as any NBCWA, or "any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required" the provision of health benefits to its retirees or contributions to the 1950, 1974 or any prior Benefit Plan. 26 U.S.C. § 9701(b)(1)(A), (B).

contribute to the Combined Fund. 26 U.S.C. §§ 9701(c)(7), 9706(a). *See generally Eastern Enterprises*, 524 U.S. at 514, 118 S.Ct. 2131.

The premiums are calculated based on the number of retired coal miners and dependents (collectively "beneficiaries") assigned to the company. *See* 26 U.S.C. § 9704. The Coal Act directs the SSA Commissioner to assign beneficiaries to signatory operators based on the following three-tiered system:

> [the Commissioner shall assign the beneficiary to] a signatory operator which (or any related person with respect to which) remains in business in the following order:
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> (1) First, to the signatory operator which –
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> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
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> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
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> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –
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> (A) was a signatory operator to the 1978 coal wage agreement or any subsequent coal wage agreement, and
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> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a).

A "related person," who may also be liable for contributing to the Combined Fund, is defined in the statute as follows:

> a person shall be considered to be a related person to a signatory operator if that person is—
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> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
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> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
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> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. § 9701(c)(2). Congress mandated that the relationship of related persons shall be determined as of July 20, 1992. *See* 26 U.S.C. § 9701(c)(2)(B).

Section 52(a) provides that "all employees of all corporations which are members of the same controlled group of corporations shall be treated as employed by a single employer." The statute then provides that "the term 'controlled group of corporations' has the meaning given to such term by section 1563(a) ..." 26 U.S.C. § 52(a). Section § 1563(a), in turn, sets out three different types of controlled groups. The only category of controlled group relevant to this case is the "parent-subsidiary controlled group" which is defined as:

> (1) Parent-subsidiary controlled group--One or more chains of corporations connected through stock ownership with a common parent corporation if--(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporation; and (B) the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at

> least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

26 U.S.C. § 1563(a). The parties here have stipulated that the Plaintiffs fall within this definition of parent-subsidiary controlled group and are therefore "related persons" within the statutory definition.

The Coal Act also aggregates the employment of retirees by each "related person" in a controlled group of corporations: "Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Furthermore, in assessing liability for premiums to be paid to the Combined Fund, § 9704(a) states that "any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a).

II. The Supreme Court's Decision in *Eastern Enterprises*

In *Eastern Enterprises*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451, the Supreme Court held that the Coal Act was unconstitutional as applied to certain former employers who had been assessed premiums by the Commissioner of the SSA. Eastern Enterprises ("Eastern") had conducted coal mining operations from 1929 until 1965, signing each NBCWA agreement executed between 1947 and 1964. *Id.* 524 U.S. at 516, 118 S.Ct. 2131. In 1965, Eastern transferred all of its coal-related operations to a subsidiary, Eastern Associated Coal Corporation ("EACC"), but retained a stock

interest in EACC. *See id.* EACC signed every NBCWA executed after 1965. *See id.* at 566, 118 S.Ct. 2131. (Breyer, J.,dissenting). *See also* Brief for the Federal Respondent, 1998 WL 25533, at *17. ("EACC was a signatory to the 1974, 1978, and 1988 agreements that expressly guaranteed lifetime benefits to all ligible miners and dependents."). In 1987, Eastern sold all of its interest in EEAC, and thereafter had no connections to the coal mining industry. *See Eastern Enterprises,* 524 U.S. at 516, 118 S.Ct. 2131.

Pursuant to § 9706(a) of the Coal Act and based on Eastern's status as a pre-1978 signatory operator for whom the miners had worked the longest period of time, the Commissioner of the SSA assigned to Eastern responsibility for paying the health care premiums for over 1,000 retired miners and their dependents. *Id.* at 517, 118 S.Ct. 2131. All of those miners had worked for Eastern before 1966. *Id.* The total liability for the premiums exceeded $50 million. *Id.* at 529, 118 S.Ct. 2131. Eastern sued the SSA Commissioner asserting that the assignment violated Eastern's substantive due process rights and constituted a taking of its property in violation of the Fifth Amendment of the United States' Constitution. *Id.* at 517, 118 S.Ct. 2131.

In an opinion in which no single rationale garnered a majority of votes, the Supreme Court held that the Coal Act, as applied to Eastern, was unconstitutional. Four justices found that the application of the Coal Act to Eastern violated the Fifth Amendment as an unconstitutional taking. *Id.* at 529-537, 118 S.Ct. 2131. Four justices found that the Act violated neither the Takings Clause nor Eastern's due process rights. *Id.* at 550-568, 118 S.Ct. 2131. Justice Kennedy, concurring in the judgment and dissenting in part, believed that the Coal Act did not work an unconstitutional taking, concluding instead that the retroactive nature of the Act violated Eastern's due process rights. *Id.* at 539-550, 118 S.Ct. 2131.

A. The Plurality Opinion

The plurality agreed with Eastern that the assignment was an unconstitutional taking due to the extreme retroactive reach of the Act. "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised." *Eastern Enterprises*, 524 U.S. at 537, 118 S.Ct. 2131. To arrive at this conclusion, the plurality employed a three-factor test which considered: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectation; and (3) the character of the governmental action. *Id.* at 518, 118 S.Ct. 2131.

Applying this test, the plurality concluded that the economic impact was considerable--between $50 and $100 million. *Id.* at 529, 118 S.Ct. 2131. While acknowledging that this type of financial burden was not a *per se* taking because it was not a permanent physical occupation of Eastern's property, the plurality explained that the Court's decisions considering the constitutionality of similar legislative schemes, *id.* at 524, 118 S.Ct. 2131, "suggest[ed] that an employer's statutory liability for multiemployer plan benefits should reflect some 'proportion[ality] to its experience with the plan.' " *Id.* at 530, 118 S.Ct. 2131 (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993)). *See also id.* at 528, 118 S.Ct. 2131 ("Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience").

As applied to Eastern, the requisite proportionality was lacking, the plurality reasoned, because:

> [w]hile Eastern contributed to the 1947 and 1950 [benefit plans], it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978 or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*
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> The company's obligations under the Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted.

Id. at 530-31, 118 S.Ct. 2131 (emphasis added).

As to Eastern's investment-backed expectations, the plurality noted that "[t]he Act's beneficiary allocation scheme reaches back 30-50 years to impose liability against Eastern based on the company's activities between 1946 and 1965 ... [The Act thereby] attaches new legal consequences to an employment relationship completed before its enactment." *Id.* at 532, 118 S.Ct. 2131 (citations omitted). The plurality found the fact that Eastern had not signed the 1974 NBCWA particularly significant because "*[n]ot until 1974 ... could lifetime medical benefits under the multiemployer agreement have been viewed as promised.*" *Id.* at 535, 118 S.Ct. 2131 (emphasis added). However, in 1974, Eastern was no longer in the coal-mining industry, therefore, the plurality

believed it unfair to allocate premiums to Eastern based on its past actions or any prior agreements, "implicit or otherwise," by the company. *Id.* at 535- 36, 118 S.Ct. 2131.

In assessing the third factor, the nature of the government's actions, the plurality acknowledged the Congressional desire to solve a "grave problem in the funding of retired coal miners' health benefits," but "[w]hen ... that solution singles out certain employers to bear a burden that is substantial in amount, based on the employer's conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." *Id.* at 537, 118 S.Ct. 2131. Thus, the plurality concluded that the Act effected an unconstitutional taking as applied to Eastern. *Id.*

As to Eastern's Due Process claim, the plurality recognized that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* (citing *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963)). Because the plurality "determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, [it did] not address Eastern's due process claim." *Id.* at 538, 118 S.Ct. 2131.

B. Justice Kennedy's Concurring Opinion

Justice Kennedy provided the fifth vote which held the Coal Act unconstitutional as applied to Eastern, but he disagreed with the plurality's analysis of the Takings Clause, explaining that: "the mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking, even as that concept has been expanded by the

regulatory takings principle." *Id.* at 542, 118 S.Ct. 2131 (Kennedy, J., concurring). Instead, Justice Kennedy concluded: "Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545, 118 S.Ct. 2131 (Kennedy, J., concurring).

Noting that the Court has long "harbored a distrust of retroactive statutes," *id.* at 537, 118 S.Ct. 2131, Justice Kennedy acknowledged that that "[w]hile we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past." *Id.* at 549, 118 S.Ct. 2131 (Kenney, J., concurring) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). As applied to Eastern, the Coal Act did not serve any remedial purpose. *Id.* at 549-550, 118 S.Ct. 2131 (Kennedy, J., concurring). Eastern had not created any expectation of lifetime health benefits, (because it had not signed the 1974 or subsequent NWBCA) and it had not been responsible for the financial turmoil in the benefit funds. *Id.* at 550, 118 S.Ct. 2131 (Kennedy, J., concurring). Rather, Justice Kennedy agreed with the plurality's conclusion that "the expectation was created by promises and agreements made long after Eastern left the coal business." *Id.* (Kennedy, J., concurring).

Therefore, despite the deferential view applied to substantive due process challenges to economic legislation, Justice Kennedy believed that the extreme retroactive nature of the liability constituted "one of those rare instances in which even such a permissive standard has been violated." *Id.* at 550, 118 S.Ct. 2131 (Kennedy, J., concurring).

C. The Dissent's Opinion

The four dissenting Justices argued that the Coal Act effected neither an unconstitutional taking, nor did it interfere with Eastern's due process rights. *Id.* at 550-68, 118 S.Ct. 2131 (Stevens, J. dissenting and Breyer, J. dissenting). Agreeing with Justice Kennedy, the dissent found that the Takings Clause was not applicable to this case because it did not concern a governmental taking of private property to serve the public good. *Id.* at 554, 118 S.Ct. 2131 (Breyer, J. dissenting). "This case involves, not an interest in physical or intellectual property," which has been the traditional focus of the Takings Clause, "but an ordinary liability to pay money, and not to the Government, but to third parties." *Id.* at 554, 118 S.Ct. 2131 (Breyer, J., dissenting).

Like Justice Kennedy, the dissenting justice concluded that "[t]he question involved--the potential unfairness of retroactive liability--finds a natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 556, 118 S.Ct. 2131 (Breyer, J., dissenting). Writing for the dissenters, Justice Breyer believed that "even though Eastern left the coal industry in 1965, the historical circumstances, taken together, prevent Eastern from showing that the Coal Act's 'reachback' liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability." *Id.* at 559, 118 S.Ct. 2131 (Breyer, J., dissenting). The dissent based this conclusion on the fact that the statute imposed liability on Eastern only for the miners that it employed, *id.;* Eastern benefitted from the employment of the miners, *id.* at 560, 118 S.Ct. 2131; Eastern contributed to making the implicit promise to miners of post-retirement benefits, even though Eastern did not sign the 1974 or subsequent NBCWAs, *id.* at 560-565, 118 S.Ct. 2131; and Eastern continued to obtain profits from the coal mining industry long after it left the industry in 1965, through its wholly owned subsidiary

EACC. *Id.* at 565-66, 118 S.Ct. 2131. Therefore, the Act did not violate either the Takings clause or the Due Process clause.

In sum, five justices rejected the takings theory, and only one decided the issue on due process grounds.

III. MASSEY COAL COMPANIES

A.T. Massey Coal Company ("A.T.Massey") is the parent company to numerous wholly-owned subsidiaries who are engaged in coalmining operations. Three of these subsidiaries join A.T. Massey as Plaintiffs in this action. The Plaintiffs have been assigned liability for paying premiums for retired coal miners and their dependants based on 26 U.S.C. § 9706(a)(3). It is undisputed that A.T. Massey and its subsidiaries comprise a "controlled group of corporations," as defined by the Coal Act. *See* 26 U.S.C. § 9701(c).

A. A.T. Massey

A.T. Massey has been assigned responsibility for paying, at varying points since February 1993, the premiums on a total of 82 retired coal miners and dependants, resulting in a total liability of $758,229.21. Despite its involvement with numerous subsidiaries who signed coal wage agreements, A.T. Massey has never signed a UMWA wage agreement. All 82 of the miners were employed by an A.T. Massey subsidiary named Ben Creek Coal ("Ben Creek") or a corporate predecessor of Ben Creek. The corporate history of Ben Creek is quite complex, though it need be discussed only briefly here.

In 1958, shortly after signing the 1958 UMWA, Merrill Coal, a subsidiary of A.T. Massey, merged with Gay Mining Company, also an A .T. Massey subsidiary. Gay

Mining signed the 1958 UMWA before changing its name in 1958 to Massey Coal Mining Company ("Masey Coal Mining"). The mining company operated under this name from 1958 to 1977 and signed the 1964 UMWA during this time period. In 1977, the company again changed its name, this time to Ben Creek Coal.

B. Massey Coal Services, Inc.

Massey Coal Services, Inc. ("Massey Coal Services"), a wholly-owned subsidiary of A.T. Massey, has been assigned, at varying points since February 1993, a total of two beneficiaries under the Coal Act, resulting in a total liability of $34,473.25. The assigned beneficiaries formerly worked for Ben Creek or its corporate predecessors. Like the parent company A.T. Massey, Massey Coal Services has never signed a UMWA wage agreement.

C. Peerless Eagle Coal Company

Peerless Eagle Coal Co. ("Peerless Eagle") has been assigned, at varying points since February 1993, a total of 45 beneficiaries resulting in a total liability of $447,877.75 in premiums. The retired miners at issue here were employed by Peters Creek Coal Company ("Peters Creek"), a coal mining company that merged into Peerless Eagle in 1962. Though Peters Creek last signed a NBCWA in 1958, Peerless Eagle has never signed a NBCWA.

D. Tennessee Consolidated Coal Company

Tennessee Consolidated Coal Company ("TCC") has been assigned, at varying points since 1993, a total of 204 beneficiaries, resulting in a total liability of $1,807,220.92 in premiums for the former miners of TCC. TCC last signed a coal wage agreement in 1960.

E. Other A.T. Massey Subsidiaries

Numerous wholly-owned subsidiaries of A.T. Massey, who are not plaintiffs to this action, signed the 1974 or subsequent NBCWAs, including: (1) Omar Mining (1974, 1978, 1981, and 1984 NBCWAs); (2) Douglas Pocahontas (1974, 1978, and 1981 NBCWAs); (3) Hopkins Creek (1978, 1981, and 1984 NBCWAs); (4) Russell Fork (1974, 1978, and 1981 NBCWAs); (5) Big Bear (1978 and 1981 NBCWAs); (6) Rocky Hollow (1974, 1978, and 1981 NBCWAs); (7) Majestic Mining (1974, 1978, 1981, and 1984 NBCWAs); (8) Dehue (1981 NBCWA); (9) PM Charles (1974 and 1978 NBCWAs); (10) Sprouse Creek (1974, 1978, and 1981 NBCWAs); (11) Vesta (1981 NBCWA); (12) Vantage Mining (1984 NBCWA); and (13) Joboner (1978 and 1981 NBCWAs).

DISCUSSION

I. Summary Judgment Standard

Summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment assumes the initial responsibility of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Catawba Indian Tribe of South Carolina v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir.1992), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1415, 122 L.Ed.2d 785 (1993); Fed.R.Civ.P. 56(c). Once this initial showing under Rule 56(c) is made, the burden of production shifts to the non-moving party, who must then "designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly

supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis added). "The evidence of the non-movant is to be believed" and "all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. 2505.

The parties here agree that there are no genuine issues of material fact in dispute.[11] Therefore, the issues being only those of law, the case is ripe for summary judgment.

II. The Constitutional Challenge

Resolution of the Plaintiffs' request for a declaration that the Coal Act is unconstitutional, as applied to them, essentially resolves the remaining claims and counterclaims. Therefore, the analysis will be made in that context. The dispositive question is whether the Plaintiffs are in a substantially identical position to the plaintiff in *Eastern Enterprises* such that the decision in *Eastern Enterprises* necessitates the conclusion that the Coal Act is unconstitutional as applied to the Plaintiffs. The Plaintiffs (who did not sign the 1974 or subsequent NBCWA) contend that the assignment to them of beneficiaries (who worked for the Plaintiff companies or other non-signatory companies) on the basis of the Plaintiffs' "related person" status to companies that signed the post-1974 NBCWAs, effects an unconstitutional taking and a violation of due process under the Fifth Amendment.

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[11] The briefs raised one possible dispute of fact concerning the correct employer for a deceased miner named Percy Richmond. Because the Joint Submission of Assignments filed on June 16, 2000 purportedly resolved all issues of disputed fact, this Memorandum Opinion does not address the liability for premiums for Mr. Richmond. If the parties believe that this issue persists, they are to file appropriate pleadings within ten days of the entry of this Memorandum Opinion and accompanying Order.

A. The Takings Claim

Though the holding in *Eastern Enterprises* was splintered, it is clear that majority of the Court believed that the Coal Act, and its assessment of premiums, did not constitute a taking within the ambit of the Fifth Amendment. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir.1999), *cert. denied* 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000). "[F]ive Justices rejected the conclusion that an unconstitutional taking was effected, reasoning that the constitutionality of the financial burden on the company imposed by the Coal Act must be considered as a question of substantive due process rather than as a takings question because no identifiable property interest was infringed by the legislation." *Id.See also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir.1999) ("we are bound to follow the five-four vote against the takings claim in *Eastern* ..."), *cert. denied* 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999); *Holland v. Pardee Coal Co., Inc.*, 93 F.Supp.2d 706 (W.D.Va.2000) ("In *Eastern Enterprises*, ... five justices unequivocally stated that constitutional challenges to the funding provisions of the Coal Act must be analyzed under the Due Process Clause and its principles of fundamental fairness ... Thus, the court will not consider the Defendants' takings claim."); *United States v. Dico, Inc.*, 189 F.R.D. 536, 543 (S.D.Iowa 1999) ("In short, the only rationale embraced by at least five judges in *Eastern Enterprises* is that retroactive application of the Coal Act to Eastern did not violate the Takings Clause.").

Because the decision in *Eastern Enterprises* clearly rejects the same takings argument which the Plaintiffs present here, the Plaintiffs' motion for summary judgment on Count II of the Complaint (the takings claim) is denied and summary judgment is granted in favor of the Commissioner on Count II.

B. The Due Process Claim

The only other argument offered to support the Plaintiffs' constitutional attack is that they are identically situated to the petitioner in *Eastern Enterprises* and that, therefore, the assessment of premiums against them here is unconstitutional for the same reason it was unconstitutional in *Eastern Enterprises*. At the outset, it is necessary to analyze and understand the effect of the fractured *Eastern Enterprises* decision before determining that decision's impact on the Plaintiffs' constitutional claims.

The assessment begins with an understanding of the principle that: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (internal citations omitted). However, there may "not always be such a common denominator in the Court's reasoning. In some splintered decisions, there will be three or more distinct approaches, none of which is a subset of another; instead, each approach is simply different." *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3d Cir.1994) (citing *King v. Palmer*, 950 F.2d 771, 782-83 (D.C.Cir.1991)). Such is the case with *Eastern Enterprises* because no single approach received a majority of the votes from the Court. *See Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C.Cir.1998) ("We have previously held that the rule of *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), under which the opinion of the Justices concurring in the judgment on the 'narrowest grounds' is to be regarded as the Court's holding, does not apply unless the narrowest opinion represents a 'common denominator of the Court's reasoning' and 'embod[ies] a position implicitly approved

by at least five Justices who support the judgment.' "). *See also Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 170 (3rd Cir.1999), ("in cases where the approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court"), *cert. denied sub nom., Anker Energy Corp. v. United Mine Workers of America Combined Benefit Fund*, 528 U.S. 1003, 120 S.Ct. 496, 145 L.Ed.2d 383 (1999).

Those courts considering the scope of the splintered decision in *Eastern Enterprises* unanimously have concluded that "*Eastern* ... mandates judgment for the plaintiffs only if they stand in a *substantially identical* position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Unity*, 178 F.3d at 659 (emphasis added). *See Anker*, 177 F.3d at 170 ("*Eastern Enterprises* requires a finding that the Coal Act is unconstitutional as applied to Anker, then, only if Anker 'stand[s] in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." ') (citing *Unity*, 178 F.3d at 659); *Association of Bituminous Contractors*, 156 F.3d at 1255 ("In short, the government is correct in stating that the only binding aspect of *Eastern Enterprises* is its specific result--holding the Coal Act unconstitutional as applied to Eastern Enterprises."); *Berwind Corp. v. Apfel*, 94 F.Supp.2d 597, 606 (E.D.Pa.2000) (same). Moreover, the parties, here, agree that the reach of *Eastern Enterprises* is limited to cases that present facts which are substantially identical to those present in *Eastern Enterprises*.

1. The Plaintiffs Are Not Substantially Identical to the Petitioner in *Eastern Enterprises*

Although there are some similarities between the Plaintiffs and Eastern, the bases for imposing liability on the respective companies under the Coal Act are sufficiently

different so as to preclude a finding that the Plaintiffs and Eastern are substantially identical. In *Eastern Enterprises,* the Commissioner of the SSA assigned to Eastern the responsibility for paying health benefit for miners it had employed before 1966. *Eastern Enterprises,* 524 U.S. at 517, 118 S.Ct. 2131. The Commissioner made this assignment, under 26 U.S.C. § 9706(a), based on Eastern's status as the pre-1978 signatory for whom the miner had worked for the longest period of time. *Id.* Eastern had not signed the "watershed" 1974 and 1978 NBCWAs, though its one- time subsidiary EACC did sign every NBCWA executed after 1965. *Id.* at 566, 118 S.Ct. 2131 (Breyer, J. dissenting). Eastern "ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's." *Id.* at 530, 118 S.Ct. 2131. Therefore, on the date specified for determining "related person" status (July 20, 1992), Eastern was not a "related person" to a signatory of the 1974 or subsequent NBCWA.

Here, as in *Eastern Enterprises,* the Commissioner assigned to the Plaintiffs the obligation to contribute to the Combined Fund, even though none of the Plaintiffs were signatories to the "watershed" 1974 or subsequent NBCWA's. However, unlike the situation presented in *Eastern Enterprises,* the Commissioner here based the assignments on the status of the Plaintiff companies as "related persons" to a 1974 or subsequent wage agreement signatory. It is undisputed that the Plaintiffs are related to numerous A.T. Massey subsidiaries who signed the 1974 or later NCBWA's.[12] Nevertheless, despite the differing theories of

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12 As a point of clarification, the Plaintiffs here do not contest the portion of the Coal Act that imposes joint and several liability upon the companies for the assignment of beneficiaries that worked for a "related person" *who was a signatory* to the 1974 or later NBCWA. Instead, the Plaintiffs contend that the Commissioner cannot, through the "related person" clause, assess liability for premiums for beneficiaries that worked for a pre-1974 signatory (or non-signatory).

liability for the beneficiaries, the Plaintiffs insist that they are substantially identically situated to Eastern and that Eastern's sale of its subsidiary EACC in 1987 should have no impact upon the analysis. This argument is unpersuasive.

Eastern Enterprises did not, in any fashion, address the constitutionality of the liability of "related persons" under the Coal Act. Indeed, the plurality specifically noted that "[a]lthough EACC continued mining coal until 1987 as a subsidiary of Eastern, *Eastern's liability under the Act bears no relationship to its ownership of EACC;* the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed, while EACC would be assigned the responsibility for any miners that it had employed." *Eastern Enterprises,* 524 U.S. at 530, 118 S.Ct. 2131.

In addition to this express disclaimer in the plurality opinion, the Plaintiffs' argument also runs afoul of the Fourth Circuit's conclusion in *Big River,* 181 F.3d 597, where the Court of Appeals made clear that *Eastern Enterprises* has no bearing on "related person" (*i.e.* control group) liability: "*Eastern Enterprises did not address* whether the Coal Act violated the due process rights of members of a control group of signatories to NBCWAs promising lifetime health benefits for retired miners." *Id.,* at 606 (emphasis added). Instead, the opinion could "*only* be viewed as rendering a decision that Congress acted arbitrarily in imposing retroactive liability on a signatory to NBCWAs in existence prior to those that promised lifetime health benefits to retired miners when that signatory made no promise of lifetime benefits, did not contribute to the problem that caused the funding shortfall for the promised lifetime benefits or to the need for such benefits, and was not put on notice by any governmental action during the relevant time period that it might be subjected to later liability." *Id.* (emphasis added and internal citations omitted). Thus, the Fourth Circuit, addressing a situation similar to the control group of related Plaintiff companies here, concluded:

> *The position of members of a control group upon whom liability is imposed only by virtue of that association is different from that of the NBCWA signatory in Eastern Enterprises.* And, the considerations bearing upon whether Congress acted rationally in imposing retroactive liability on the NBCWA signatory in Eastern Enterprises are different than those relating to the rationality of imposing liability on members of a control group of a 1978 or subsequent benefit plan signatory, although admittedly some of the same arguments can be made with respect to both issues.

Id. (emphasis added).[13]

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[13] The Plaintiffs try to shoehorn a "related person" liability analysis into the plurality's holding *Eastern Enterprises* by relying upon various arguments made by the dissent in *Eastern Enterprises* indicating that Eastern's connection to EACC should be sufficient to support liability under the Act. *See , 118 S.Ct. 2131Eastern Enterprises,* 524 U.S. at 565, 118 S.Ct. 2131 (Breyer, J., dissenting) ("Eastern effectively ran EACC, sharing officers, supervising management, and receiving 100% of EACC's approximately $100 million in dividends."); *id.* at 566, 118 S.Ct. 2131 ("Eastern officials, in their role as EACC directors, ratified the post-1965 bargaining agreements ... and must have been aware of the [benefit fund's] deepening financial crisis.") Thus, the Plaintiffs contend that "[t]he Court had a related person situation squarely in its sights, and the plurality necessarily considered the relevance of that relationship before it voided Eastern's assignments." Plaintiffs' Reply Brief at 7.

This attempt to cobble together a fact-specific constitutional holding from the splintered decision in *Eastern Enterprises* is unsuccessful. As an initial matter, the Plaintiffs' contention that the plurality *Eastern Enterprises* necessarily decided the constitutionality of "related person" liability flatly contradicts the Fourth Circuit's holding to the contrary in *Big River,* a decision which is controlling here.

Secondly, it would be jurisprudential error to infer conclusions and assumptions (which were unstated) by the plurality by dissecting the views of the dissent. As explained above, when a Supreme Court decision is as fractured as *Eastern Enterprises,* the decision leaves almost no precedential guidance to lower courts. Whatever the holding of *Eastern Enterprises* may be, a district court must reject invitations to expand that holding by inferring unspecified "necessarily considered" conclusions.

In response, the Plaintiffs argue this case is factually distinct from the situation considered in *Big River* and the other cases upon which the Defendants rely, such as *Unity*, 178 F.3d 649, and *Anker*, 177 F.3d 161. To the extent that these cases may have factual distinctions, these distinctions are irrelevant to the issue presented here, namely whether the Plaintiffs are substantially identical to Eastern.

2. *Big River*

In *Big River*, the district court entered a judgment requiring the defendant companies to pay premiums for 11 retired miners. *See* 181 F.3d at 600. Because the district court's decision was made before the Supreme Court decided *Eastern Enterprises*, two of the defendant companies filed a motion for reconsideration in light of that decision because those companies "never employed the covered miners and were not within the control group when the miners were employed." 181 F.3d at 600, 604. The district court held that the defendants had waived their constitutional challenge to the Coal Act. *Id.* at 600. In affirming the district court, the Fourth Circuit noted the defendants were not signatories to a wage agreement providing lifetime benefits to miners, however they were members of a control group of a signatory company. *Id.* at 604.

As argued by the Plaintiffs here, the facts of *Big River* are somewhat distinct from the Plaintiffs' situation because the Commissioner in *Big River* did not attempt to hold the defendant companies liable for providing health benefits to their *own* former employees. Nevertheless, the ultimate holding of *Big River* did not hinge upon this factor. Instead, as explained above, *Big River* stands for the proposition that, whatever the basis for the unconstitutionality of the Coal Act as applied in *Eastern Enterprises*, the decision did not address control group or related person liability. *See Big*

River, 181 F.3d at 606. Thus, the decision in *Big River* is not amenable to the distinction which the Plaintiffs attempt to ascribe to it.

3. *Anker*

In *Anker*, the plaintiff Anker Energy Corp. ("Anker") contested the assignment of liability to pay premiums for miners employed King Knob Coal Co., Inc. ("King Knob"), a related company to Anker. *Anker*, 177 F.3d at 166. It was undisputed that King Knob signed wage agreements promising lifetime benefits to miners and that Anker was a related company to King Knob. *Id.* at 166-67.

The Third Circuit rejected the plaintiffs' argument that they were substantially identical to Eastern. *Id.* at 172. The *Anker* court read *Eastern Enterprises* to mean "that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter." *Id.*

Though both Anker and King Knob were the petitioners in *Anker*, the Third Circuit explained that "[a]s a matter of convenience we usually refer to Anker alone as the plaintiff and appellant." *Id.* at 167. The court then went on to explain that "[w]e believe the fact that Anker was a signatory to [wage agreements] from the 1970s until 1984 factually distinguishes Anker's situation from that of Eastern Enterprises and compels a finding that the Act is constitutional in this instance." *Id.* at 172. Therefore, Anker's and King Knob's claims "[fell] outside the specific holding of *Eastern Enterprises*," and the application of the Coal was constitutional. *Id.*

It appears that the assignment of beneficiaries in *Anker* focused only upon the liability of Anker as a "related person" to King Knob, the employer of the retired miners and a signatory to wage agreements in the 1970's and 1980's. In the present action, the Plaintiffs are at great pains to point out that they were assessed liability not for miners that worked for "related" post-1974 signatories, but instead were held liable for their *own* employees and employees of other related companies that did not sign the 1974 or subsequent NBCWAs. This effort to distinguish *Anker* is unpersuasive because the *Anker* court focused not on the source the liability, but rather the rationale for imposing that liability. Unlike the situation in *Eastern Enterprises,* Anker was a "related person" to a company that had signed the pivotal 1970s wage agreements. Agreeing with the reasoning of the United States Court of Appeals for the District of Columbia, the *Anker* court stated, "The clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." *Id.* at 172 (quoting *Association of Bituminous Contractors,* 156 F.3d at 1257). Thus, the fact that the assigned beneficiaries may not have been employed by the "related person" companies who signed the relevant wage agreements is insufficient to escape the reach of *Anker* (or place the Plaintiffs within the ambit of *Eastern Enterprises*) because *Anker* emphasizes that it is the *association* with a signatory related company that supports the imposition of liability for health benefits. *See id.* at 172 (" 'the crucial fact upon which the *Eastern Enterprises* plurality and Justice Kennedy relied in concluding that Eastern's Coal Act liability was disproportionate to its past conduct and thus unfairly retroactive-namely Eastern's departure from the coal industry in 1965-is absent in this case" ') (quoting *Association of Bituminous Contractors,* 156 F.3d at 1256).

4. *Unity*

Perhaps the most factually analogous case, and the most detrimental to the Plaintiffs' argument, is the Third Circuit's decision in *Unity*. Because the intricate factual details of *Unity* are not set forth with detail in the Court of Appeals' opinion, it is helpful to turn to the underlying district court proceedings to fully understand the background of the case. *See generally Real Estate Co. v. Hudson*, 977 F.Supp. 717, 718 (W.D.Penn.1997) (district court summary judgment opinion); *Unity Real Estate v. Hudson*, 889 F.Supp. 818, 821 (W.D.Penn.1995) (district court preliminary injunction opinion).

The Plaintiff Unity Real Estate Co. ("Unity") was a corporation held by the members of the Jamison family, owned only a commercial building and a parking lot. *Unity* 178 F.3d at 654-55. Unity, however, had been assigned premiums under the Coal Act as a "related person" to several coal mining companies, which were also formed by members of the Jamison family: South Union-PA, South Union-WVA and Stewart Coal and Coke Co. *Id.* at 655. South Union-PA mined Coal from 1923 to 1961 and signed the 1947 NCBWA. *Id.See also Unity Real Estate Co. v. Hudson*, 977 F.Supp. 717, 718 (W.D.Penn.1997) (district court summary judgment opinion) ("In 1961, South Union [PA] closed down and remained idle until its merger with Unity in 1969."). South Union-WVA was incorporated in 1974 as a wholly-owned subsidiary of Unity and operated the coal mine formerly run by South Union-PA from 1975 to 1981. *Unity*, 977 F.Supp. at 719 (district court summary judgment opinion). South Union-WVA signed the 1974, 1978 and 1981 NBCWAs.[14] *Unity*, 178 F.3d at 655. Lastly, Stewart Coal & Coke Co. ("Stewart") was incorporated by the Jamison family in 1949 and operated a coal mine and coke

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[14] A bankruptcy court ultimately allowed it to renounce its obligations under the 1981 agreement. *Id.*

manufacturing plaint until the late 1950s. *Unity*, 977 F.Supp. at 719 (district court summary judgment opinion). Stewart made payments into the UMWA benefit funds from 1949 to 1958. *Id.* Other related companies in the Jamison corporate family signed NBCWAs at various times from the 1960s through the 1970s. *Unity*, 178 F.3d at 655.

The Commissioner assigned beneficiaries to Unity "on the basis that the beneficiaries, or their deceased parents or spouses in the case of survivor beneficiaries had last worked for South Union (Pennsylvania) or South Union (West Virginia) pursuant to a NBCWA." *Unity Real Estate v. Hudson*, 889 F.Supp. 818, 821 (W.D.Penn.1995) (district court preliminary injunction opinion). Thus, the Commissioner assigned liability based on the miners' employment with South Union-WVA, a related company who signed a post-1974 wage agreement, *and* employment with South Union-PA, a related company who *had not* signed the pivotal 1974 and subsequent NBCWAs. On appeal, it appears that Unity did not differentiate its challenge to the assignment of beneficiaries on the basis that some of the miners had been employed by post-1974 signatories while others were employed by companies who had not signed the "watershed" agreements.[15] *See Unity*, 178 F.3d at 655 ("The

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15 The Plaintiffs here have submitted the affidavit of David L. Laurent in an attempt to escape the direct applicability of *Unity*. Mr. Laurent, counsel for Unity in that action, explains that Unity did not challenge the constitutionality of the assignments for beneficiaries who had worked only for South Union-PA (the pre-1974 signatory) because Unity had limited financial resources. From this, the Plaintiffs extrapolate that, "because of the particular procedural posture of [*Unity*], the Third Circuit was not presented and never decided the issue of whether the assignment to Unity of beneficiaries that worked only for a pre-1974 signatory could be deemed constitutional based solely on the fact that one of Unity's other related persons (South Union WVA) had signed a 1974 NBCWA." Plaintiffs' Reply Brief for Summary Judgment and Brief in Opposition to Defendants' Motion for Summary Judgment at 21. This affidavit does not change the procedural posture of *Unity*. While the petitioners in that case may not have made the arguments presently

assignment was based upon Unity's prior employment of 63 miners, who had worked for Unity and its related companies, on average, for ten years").

Even though the Third Circuit was not faced with the precise arguments made here, the finding in *Unity* that the parent company could be held liable to pay premiums for miners that worked both for pre- and post-1974 related companies makes *Unity* especially helpful here, both factually and analytically. Thus, *Unity* 's conclusion is persuasive authority.

In *Unity,* the Third Circuit found that "[b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, *they are factually distinguishable* from Eastern Enterprises." *Unity* 178 F.3d at 659. The parent company Unity never signed a coal wage agreement, therefore the Court's reference to the

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(...continued)
pressed by the Plaintiffs, the Third Circuit nevertheless found that the assignment of beneficiaries--*all* beneficiaries was a constitutional application of the Coal Act and that Unity was not in a substantially identical situation to Eastern. Though the recitation of facts in the appellate *Unity* decision may not make the distinction crystal clear, this Court is quite reticent to assume that the Third Circuit did not understand the factual background of the controversy before it. Indeed, the lack of distinction between the pre- and post-1974 signatory related companies could arguably support the idea that the Third Circuit simply perceived no difference between the two.

Additionally, the Trustees highlight another difficulty with attributing any significance to Mr. Laurent's affidavitit is simply incorrect. Out of the 63 retired coal miners who were assigned to Unity, only 10 ever worked for South Union-WVA, the only post-1974 signatory employer at issue. *See* Trustee's Reply Memorandum in Support of Summary Judgment (citing to and attaching Unity Real Estate Company's Responses to Defendants' First Request for Admissions at Nos. 28, 34-96). Thus, if Unity truly sought to efficiently limit its liability, it would have made this argument as well because that would have significantly limited its exposure. The simple truth, however, is that the Third Circuit considered the challenge as presented that is, whether or not Unity could be assessed liability for health benefits for miners who worked for related companies who were both pre- and post-1974 signatories to NCBWAs.

participation in the 1974 and later NBCWAs must necessarily refer to the fact that South Union-WVA, a related company to Unity, signed the agreement. This single company's participation in the "watershed" wage agreements was sufficient to impose liability for health benefits for miners who had worked for all the companies, not just those employed by the signatory company.

Like other courts considering the matter, the *Unity* court explained that "[l]anguage in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion." *Id.* Moreover, the fact that *Eastern Enterprises* did not address related company liability buttressed the court's conclusion: "Although we recognize that the [*Eastern Enterprises*] Court was not presented with argument focused on post-1978 signatories and thus may not have had before it all the available evidence about later contracts, *that very distinction compels the conclusion that Eastern is not on all fours with the case before us.*" *Id.* (emphasis added).

5. Conclusion

As *Big River, Anker* and *Unity* demonstrate, a company that is assigned liability for premiums under the Coal Act based on its status as a "related person" to a 1974 or subsequent NBCWA signatory is not substantially identical to Eastern because *Eastern Enterprises* did not addresses related person liability. Instead, it merely held that the assignment of the obligation to pay premiums to a company that did not promise lifetime health benefits, and who was not a "related person" to a company that made such a promise, was unfairly retroactive and, therefore, unconstitutional.

While the thorny issue of beneficiary assignments under the Coal Act may have other statutory fallacies,[16] those arguments are not raised here by the Plaintiffs. Significantly, the Plaintiffs failed to articulate any due process violation other than its substantial identity to the facts of *Eastern Enterprises*.[17] The Plaintiffs have failed to explain why, if the Court were to find them not substantially identical to Eastern, the application of the Coal Act could nevertheless work a violation of due process. It would be inappropriate to entertain other possible, but ill-defined, due process argument because "[c]ourts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted

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[16] Of particular note is *Berwind Corp. v. Apfel*, 94 F.Supp.2d 597 (E.D.Pa.2000), where the plaintiff company made the same arguments pressed here (*i.e.*, that the Commissioner could not constitutionally assign to a company liability to pay premiums for its *own* retired miners when that company did not sign the relevant NBCWAs) and the district court held that the application was unconstitutional under *Eastern Enterprises*. That decision, however, was directed more to what the district court believed was an erroneous application of the Coal Act than the similarity of the Plaintiffs to Eastern.

To the extent that *Berwind* may have relevance here, the Court finds more persuasive the decision in *Shenango, Inc. v. Apfel*, Civil Action No. 99- 1035 (W.D.Pa. July 25, 2000), in which the district court concluded that the plaintiffs were not substantially identically situated to Eastern, despite the fact that the companies for whom the beneficiaries had worked had never signed the 1974 or subsequent NBCWAs. Both *Shenango* and *Berwind* are currently on appeal to the Third Circuit.

[17] Indeed, during argument on this motion, the Plaintiffs were quite pointedly asked to identify and articulate any other due process argument. They could not. Even though the Defendants' pleadings should have put the Plaintiffs on notice that their due process argument was quite narrow, *see* Trustees' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 14 ("The Massey Plaintiff's sole argument in support of their motion for summary judgment is that they are identically situated to the petitioner in *Eastern* "), the Plaintiffs simply ignored this warning and proceeded with a single focus on aligning itself to *Eastern Enterprises*.

under specific constitutional clauses." *Association of Bituminous Contractors*, 156 F.3d at 1253. Therefore, unlike the arguments made, and decisions reached, in *Unity* and *Anker*, it is unnecessary to address the any remaining due process considerations. *See Unity*, 178 F.3d at 659 ("To the extent that *Eastern* embodies principles capable of broader application, we believe that due process analysis encompasses the relevant concerns... and we believe that the relevant measurement is the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act."); *Anker*, 177 F.3d at 172-73 ("our opinion in *Unity Real Estate* directs us to apply an additional level of due process analysis designed to measure 'the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." '). *See also Association of Bituminous Contractors*, 156 F.3d at 1255 (because the plaintiffs were not substantially identical to Eastern "our basic inquiry in resolving appellant's due process challenge remains the same ...").

Because the Plaintiffs fail on their sole due process argument, the Plaintiffs' motion for summary judgment is denied and summary judgment is granted in favor of the Defendant Commissioner on Count I.

III. The Commissioner's Assignment of Beneficiaries to the Plaintiffs

The Commissioner's decision to assign beneficiaries to the Plaintiffs must be set aside if the Court finds that his action was either "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). The Plaintiffs assert that the SSA Commissioner's action was not in accordance with law because it is contrary to both the

Supreme Court's decision in *Eastern Enterprises* and the Plaintiffs' constitutional rights. Having found above that the assessment of premiums to the Plaintiffs under the Coal Act is not in contravention of the Supreme Court's holding in *Eastern Enterprises,* the SSA Commissioner's decision must stand as it is neither arbitrary nor capricious, and otherwise is in accordance with law. Therefore, the Plaintiffs' motion for summary judgment on Count III is denied and summary judgment is granted in favor of the Defendant Commissioner on that count.

IV. Return of Plaintiffs' Premiums Already Paid

Having found that the premiums were constitutionally assessed against the Plaintiffs under the provisions of the Coal Act, the Court also finds that the Plaintiffs are not entitled to have the Combined Fund return those premiums paid to the Fund. Therefore, the Plaintiffs' motion for summary judgment is denied on Counts IV and VI. [18]

V. The Trustee's Counterclaims

In their motion for summary judgment, the Trustees make the bare assertion that summary judgment is appropriate for their counterclaims as well. However, the Trustees provide no argument or decisional support as to why that may be appropriate. The Trustees presented no argument or evidence supporting their claim for damages incurred as a result of the Plaintiffs' refusal to pay premiums, nor have they supported their claim for injunctive relief to require the Plaintiffs to pay the premiums and to prevent the

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[18] Although the Defendant Trustees moved for summary judgment on their counterclaim, the Trustees did not seek summary judgment as to the Plaintiffs' claims. Nevertheless, resolution of the Plaintiffs' motion for summary judgment and the Commissioner's motion for summary judgment essentially resolves all issues in this action, thereby rendering the claims directed against the Trustees moot.

Plaintiffs from improperly disposing of corporate assets. Therefore, the motion for summary judgment on those counterclaims (Counts II and III) is denied.

As to the Trustee's request for a declaratory judgment that the Coal Act is constitutional as applied to the Plaintiffs, that request has been mooted by the disposition of the Plaintiffs' claims. *See United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947) ("For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite. This is as true of declaratory judgments as any other field.") (internal quotations omitted). To determine whether a declaratory judgment requests presents a justiciable controversy, the court must consider "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). Here, there is no longer a substantial controversy, and, to the extent that there is a controversy, it is not sufficiently immediate or real to warrant adjudication of a constitutional claim. Therefore, upon the resolution of the Plaintiffs' claims, the request for declaratory judgment by the Trustees is denied as moot.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment is denied and the Defendant Commissioner's Motion for Summary Judgment is granted. The Trustees' Motion for Summary Judgment on their Counterclaims is denied.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 3:99cv83

A.T. MASSEY COAL COMPANY, INC., *et al.*
Plaintiffs,

v.

LARRY G.MASSANARI,
Acting Commissioner of Social Security, *et al.*,
Defendants.

UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT FUND, *et al.*,
Counterclaim Plaintiffs,

vs.

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Counterclaim Defendants.

[Entered: August 27, 2001]

ORDER

Upon consideration of the Joint Motion for Order Amending Judgment, the Stipulation of the parties and agreement of counsel, and for good cause shown, it is hereby ORDERED that:

(1) the Joint Motion for an Order Amending Judgment be, and hereby is GRANTED;

(2) the Stipulation entered into among and between the Plaintiffs/Counterclaim Defendants, the Counterclaim Defendants, and the Defendants/Counterclaim Plaintiffs is hereby incorporated by reference;

(3) the Plaintiff/Counterclaim Defendants and Counterclaim Defendants will pay the Defendant/Counterclaim Plaintiffs the relief that is set forth in the parties' Stipulation, in the amount and in the manner agreed to by the parties;

(4) the Court's Judgment and Order of July 29, 2001 be amended in accordance with the terms of the parties' Stipulation; and

(5) in accordance with the parties' Stipulation, and in light of the entry of this Order, the Defendant/Counterclaim Plaintiffs' Motion to Alter or Amend Judgment dated August 2, 2001 shall be deemed withdrawn.

The Clerk is directed to send a copy of this Order to all counsel of record and to close the case.

It is so ORDERED.

\s\ Robert E. Payne
United States District Judge

Richmond, Virginia
Date: August 27, 2001

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 706.

Section 706 provides, in pertinent part, that a reviewing court shall:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
> >
> > (B) contrary to constitutional right, power, privilege, or immunity . . . .

26 U.S.C. § 9701(c)(2)

(A) In general.–A person shall be considered to be a related person to a signatory operator if that person is–

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii) or (iii).

(B) Time for determination.–The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

26 U.S.C. § 9704(a)

Section 9704(a) provides, in pertinent part:

> Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

26 U.S.C. § 9706(a)

(a) **In general.**-- For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(b)

Section 9706(b) provides, in pertinent part:

> **(b) Rules relating to employment and reassignment upon purchase.**–For purposes of subsection (a)–
>
> **(1) Aggregation rules.–**
>
> **(A) Related person.–** Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

No. 02-956

FILED
FEB 21 2003

IN THE

Supreme Court of the United States

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

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QUESTION PRESENTED

Petitioner A.T. Massey Coal Company, Inc. ("A.T. Massey") is the parent of a large group of coal companies, created at different times for different purposes but all operating as a single entity directed from A.T. Massey's Richmond headquarters. Many of the corporate entities in the Massey group of companies signed collective bargaining agreements with the United Mine Workers of America ("UMWA"), including in particular the National Bituminous Coal Wage Agreements ("NBCWAs") of 1974, 1978, 1981, and 1984. Each of the latter agreements referred explicitly to lifetime health coverage for retired coal miners and their dependents.

The question presented is whether the court of appeals correctly sustained application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), to the four petitioner Massey entities, which, though not themselves post-1974 NBCWA signatories, are statutory "related persons" to other members of the A.T. Massey corporate family that signed post-1974 NBCWAs. Put another way, the question is whether Congress correctly concluded in the Coal Act that neither the Due Process Clause nor the Takings Clause of the Fifth Amendment presents any obstacle to treating all the Massey entities as a single controlled group of corporations for purposes of assessing liability for retiree health care under the statute.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-956

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Petitioners,
v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-27) is reported at 305 F.3d 226 (4th Cir. 2002). The opinion of the district court (Pet. App. B-1 to B-42) is reported at 153 F. Supp. 2d 813 (E.D. Va. 2001). The district court's order amending its judgment (Pet. App. C-1 to C-2) is not reported.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), as applied to petitioners. Petitioners do not reproduce the statute in full in their submission. Among other things, they omit the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy. Accordingly, the complete Coal Act is reproduced as an appendix to this brief.

STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 542 U.S. 498 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the petitioner in that case. The plurality and concurring opinions in *Eastern* held that Section 9706 (a)(3) of the statute, 26 U.S.C. § 9706 (a)(3), is unconstitutional as applied to a company that left the coal business in 1965, did not sign any collective bargaining agreement with the UMWA after that time, and was not a statutory "related person" to any company that signed a National Bituminous Coal Wage Agreement ("NBCWA") in 1974 or thereafter. In contrast to the petitioner in *Eastern*, the four petitioners here, A.T. Massey Coal Company, Inc., Massey Coal Services, Inc., Peerless Eagle Coal Company, and Tennessee Consolidated Coal Company (collectively, "Massey" or the "Massey Companies"), either own or are under common control with more than a dozen statutory "related persons" that signed NBCWAs in 1974, 1978, 1981, or 1984. The Massey Companies thus are readily distinguishable from Eastern.

Contrary to the Massey Companies' characterization, this case does not involve a refusal by the Social Security Administration ("SSA") to withdraw Coal Act liability imposed on companies that are "substantially identical" to

Eastern. Rather, the issue here is whether the congressional decision to treat all members of a corporate control group as a single entity for purposes of Coal Act liability violates the Takings Clause or the Due Process Clause of the Fifth Amendment. The court of appeals properly concluded that it does not.

After *Eastern*, SSA notified approximately 122 operators that were similarly situated to Eastern (in that neither they nor any of their related persons under the Coal Act had signed a 1974 or later NBCWA) that their Combined Fund beneficiary assignments were void in light of *Eastern*. The Massey Companies, not fitting that description, received no such notice. The Massey Companies' challenge to their Coal Act liability entirely ignores the fact that numerous Massey entities, controlled by petitioner A.T. Massey, voluntarily agreed to the 1974, 1978, 1981, and 1984 NBCWAs. These entities thus made health care commitments not only to their own retirees but also to *all* of the other beneficiaries of the collectively bargained multiemployer health care plans, including in particular the retirees of other Massey entities (whether or not those specific entities were still in business). Nothing in the various opinions in *Eastern* precludes all of the Massey entities, including petitioners, from being held responsible for the health care of all Massey retirees, including retirees of individual Massey companies that may have gone out of business or otherwise elected not to sign later collective bargaining agreements with the UMWA.

I. History And Structure Of The Coal Act

The history of the health care crisis in the coal industry and the events leading to the enactment of the Coal Act have been recounted in detail in various decisions, including several decisions of this Court. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748 (Jan. 15, 2003); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002); *Eastern*

Enterprises v. Apfel, 524 U.S. 498, 504-11 (1998) (plurality opinion). We therefore summarize only those aspects of that background that are relevant here.

A. History Of The Coal Act

The coal industry and health care for retired coal miners have been subject to extensive government intervention and regulation for more than 50 years. Since the government seized the nation's coal mines in 1946 and entered into the historic Krug-Lewis Agreement that year, retiree health benefits have been provided through a series of collectively bargained multiemployer health plans established under a succession of NBCWAs. The UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multiemployer bargaining association, have negotiated these NBCWAs since 1951. As a general matter, these NBCWAs provided for the funding of health benefits for retirees through levies assessed against the coal operators on the basis of the amount of coal mined or the number of covered hours worked under a particular collective bargaining agreement. These levies were paid into a series of trust funds established by the NBCWAs over the years (the "UMWA Plans"). By their nature as multiemployer trusts, the UMWA Plans continued to provide benefits to eligible retirees even if the former employers of such retirees went out of business or otherwise stopped paying into the Plans; in that event, the benefits were financed by the participating coal operators that remained.

During the years preceding passage of the Coal Act, the financial situation of the UMWA Plans grew increasingly precarious. As health care costs increased, coal operators began exiting the coal industry and "dumping" their retirees into the UMWA Plans, where their benefits would be funded by those operators still mining coal. As the number of coal operators contributing to the UMWA Plans decreased, fewer and fewer operators were left to carry the burden of rapidly

rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship. The continued viability of the UMWA multiemployer health care system was cast in serious doubt.

In 1989, the UMWA engaged in a ten-month strike against the Pittston Coal Company, which was resolved only after Secretary of Labor Dole intervened and appointed a mediator. The settlement eventually reached provided, *inter alia*, for the creation of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide commission charged with the task of analyzing the retiree health care crisis and recommending solutions.

On November 5, 1990, the Coal Commission issued its report. (*See* App. 336-471.)[1/] The Commission declared that the primary objective of any proposed solution should be to ensure the continuation of retiree health benefits. The Commission explained that the collective bargaining process -- limited as it was to companies still mining coal -- was inadequate to provide a long-term solution. Accordingly, the Commission recommended that Congress enact legislation to address the problem. After two years of deliberations on the Coal Commission's report and recommendations, Congress enacted the Coal Act.

B. Structure Of The Coal Act

The Coal Act has three primary components intended to ensure that retired coal miners and their dependents continue to receive their health benefits and that, to the extent possible, those benefits are financed by the companies that

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1/ "App." refers to the appendix filed in the court of appeals.

formerly employed the retirees. The first of these components is the Combined Fund. The Coal Act directed that the existing UMWA 1950 and 1974 Benefit Plans, the two collectively bargained UMWA Plans whose financial crisis had led to enactment of the statute, be merged into the new Combined Fund as of February 1, 1993. 26 U.S.C. § 9702(a). The Combined Fund provides health and death benefits to retired coal miners who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Plan. 26 U.S.C. §§ 9703(a), (b)(1), (e), (f).[2/] The coal operators that voluntarily participated in the UMWA Plans pursuant to the terms of their collective bargaining agreements with the UMWA, including the Massey Companies and the coal operators affiliated with them, are required to finance the benefits provided by the Combined Fund. Coal Act premiums are based on the number of Combined Fund beneficiaries that have been assigned to the operators by the Secretary of Health and Human Services (now, the Commissioner of Social Security) under Section 9706 of the Act.

An integral part of the Combined Fund assignment structure is the treatment of "related persons." In enacting the Coal Act, Congress determined that it was necessary to treat members of corporate families as one entity for purposes of imposing liability for Combined Fund premiums, to ensure that the vagaries of internal corporate structuring

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2/ The second component of the Coal Act's statutory scheme is the mandated continuation of individual employer health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. The third component is the UMWA 1992 Plan, which provides benefits (a) to persons who, but for the enactment of the Coal Act, would have been eligible to receive benefits from the UMWA 1950 or 1974 Benefit Plan, but who are not eligible for benefits from the Combined Fund, and (b) to persons who are entitled to receive benefits directly from their former employers but who do not in fact receive such benefits. 26 U.S.C. § 9712.

and restructuring did not interfere with the legislative scheme. The Coal Act accomplishes this goal in three ways.

First, the Coal Act permits beneficiary assignments to be made to signatory operators or to their "related persons." 26 U.S.C. § 9706(a). Section 9701 provides that an entity is a "related person" to a signatory operator if it is, among other things, a member of the same "controlled group of corporations" that includes the signatory operator, as that term is defined in 26 U.S.C. § 52(a). In turn, Section 52(a) of the Internal Revenue Code defines a "controlled group of corporations" to include, *inter alia*, parent-subsidiary groups, where the parent owns more than 50 percent of the total voting power of all classes of stock in the subsidiary or where the parent owns more than 50 percent of the total value of shares of all classes of stock in the subsidiary. 26 U.S.C. §§ 52(a), 1563(a). The determination of which entities are "related persons" for purposes of the Coal Act is generally made as of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B). A "related person" thus need not ever have mined coal or signed any NBCWAs, as long as it satisfies the statutory definition as of the prescribed date. In the proceedings below, the four Massey Companies admitted that they are "related persons" to each other and to the following entities, all but the first of which signed one or more NBCWAs in 1974 or thereafter: Rawl Sales and Processing Company, Omar Mining Company, PM Charles Coal Company, Rocky Hollow Coal Company, Sprouse Creek Processing Company, Big Bear Mining Company, Dehue Coal Company, Douglas Pocahontas Coal Corporation, Hopkins Creek Coal, Joboner Coal Company, Majestic Mining, Vantage Mining Company, Russell Fork Coal Company, and Vesta Mining Company (collectively, "Massey's Related Persons"). (*See* App. 142-150.)

Second, the Coal Act aggregates the employment of retirees by each "related person" in a corporate family, and treats the related persons as a single employer for purposes of

assigning Combined Fund beneficiaries. The statute provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Thus, every member of a controlled group is treated as if it had employed each of the miners that any one member had employed. As a consequence, with regard to these miners, as long as at least one member of the controlled group signed an NBCWA in 1974 or thereafter, all of the miners employed by any member of the group are to be treated as if they had been employed by a 1974 or later signatory, and any member of the controlled group is to be treated as if it had signed the NBCWAs that other members of the group had signed.

Third, the Coal Act makes all related persons jointly and severally liable for the obligations imposed under the statute. For example, with respect to Combined Fund premiums, Section 9704(a) provides: "Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a); *see also* § 9711(c) (individual employer plan obligations), § 9712(d)(4) (1992 Plan obligations).[3/]

[3/] The Coal Act also provides additional mechanisms to finance the health care cost associated with "orphan" beneficiaries in the Combined Fund, *i.e.*, Combined Fund beneficiaries whose employers are no longer in business and who could not be assigned to any signatory operator or related person under the criteria set forth in Section 9706 of the Coal Act. Specifically, Congress authorized transfers of substantial sums to the Combined Fund from the UMWA 1950 Pension Plan and from the Abandoned Mine Reclamation Fund (the "AML Fund"). *See* 26 U.S.C. § 9705; 30 U.S.C. § 1232(h). In addition, Congress has authorized two special transfers from the AML Fund over and above the transfers set forth in the Coal Act itself. *See* Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, Title V, 1999 U.S.C.C.A.N. (113 Stat.) 1501, 1501A-214; Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 701(a), 2000 U.S.C.C.A.N. (114 Stat.) 922, 1024-25.

II. The Massey Companies' Extensive Involvement In The Coal Industry And The BCOA-UMWA Collectively-Bargained Health Care System

The Massey Companies, in their petition, seek to diminish their extensive involvement in the coal industry by omitting any reference to their mining activities after approximately 1964. In fact, petitioner A.T. Massey and its myriad subsidiaries began mining coal years before the adoption of the first NBCWA in 1947. These operations have continued to the present, and A.T. Massey's history of constantly shifting corporate structures aptly illustrates the coal industry characteristic that Congress later sought to address in the Coal Act by adopting provisions designed to prevent the complexities and fortuities of corporate form from enabling coal operators to evade their federal health care liabilities.

A.T. Massey is the parent corporation of not only the other three petitioners here but also Massey's Related Persons as well as numerous other coal companies engaged in the mining, sale, and distribution of coal. As the court of appeals recognized in earlier litigation, these numerous companies function as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters." *A.T. Massey Coal Co. v. International Union, UMWA*, 799 F.2d 142, 144 (4th Cir. 1986). Members of the A.T. Massey controlled group signed NBCWAs during the 1940s, 1950s, 1960s, 1970s, and 1980s. (App. 148-149, 514-515.) As of July 20, 1992, at least a dozen Massey companies had signed the 1974 or later NBCWAs. (App. 144, 148-149.)

According to the petition, "the 1974 NBCWA was a watershed collective bargaining agreement because it was the first coal wage agreement to expressly provide that retirees would have health care for life." (Pet. 5.) *See also Eastern,*

524 U.S. at 509 (plurality opinion) (the 1974 NBCWA was "the first agreement between the UMWA and the BCOA to expressly reference health benefits for retirees"). During the term of that agreement, however, the UMWA multiemployer health care system experienced financial difficulties caused by several factors, including the continued effort by coal operators to shed their contribution obligations. *Id.* at 510. (*See also* Pet. App. A-8.)

In response to these problems, BCOA demanded in collective bargaining in 1977 that the 1974 Benefit Plan be eliminated.[4/] *District 17, UMWA v. Allied Corp.*, 765 F.2d 412 (4th Cir.), *cert. denied*, 473 U.S. 905 (1985). When the parties failed to reach agreement, a protracted strike ensued that ended in a compromise that retained the 1974 Benefit Plan but changed its purpose. *Id.* at 414. Under the 1978 NBCWA, each signatory employer became responsible for providing health care benefits for its own active and retired employees, while the 1974 Benefit Plan was retained as an "orphan" plan to provide health benefits on a multiemployer basis to certain eligible retirees. (*See* Pet. App. A-8.) The companies that signed the 1978 NBCWA agreed to continue funding the benefits previously provided by the 1974 Benefit Plan as long as the companies remained in the coal business, "regardless whether they signed a subsequent agreement." *Eastern*, 524 U.S. at 510 (plurality opinion). As in the 1974 NBCWA (and indeed in multiemployer plans generally), the signatories to the 1978 NBCWA made commitments not only to their own retirees but to all participants in the UMWA multiemployer health care system, including coal industry retirees whose former employers were no longer in business or were no longer NBCWA signatories.

4/ E. Morgan Massey, President of the A.T. Massey Coal Company, was a member of BCOA's board of directors at the time. *UMWA 1974 Pension Trust v. Pittston*, 739 F. Supp. 339, 342 (D.D.C. 1992).

Approximately a dozen subsidiaries of A.T. Massey signed the 1978 NBCWA and its successor agreement, the 1981 NBCWA. (App. 148-149.) As soon as these subsidiaries signed these NBCWAs, however, they began a concerted effort to terminate their obligations to the UMWA Plans. Meanwhile, thousands of retirees from the Massey controlled group of corporations remained eligible beneficiaries of the multiemployer plans, whose health care had to be funded by the remaining participating employers.[5/]

In 1984, virtually all of the Massey companies refused to sign the NBCWA, resulting in a strike that lasted until 1988 when Massey and its subsidiaries signed agreements with the UMWA that purported to reduce or eliminate the Massey companies' obligation to fund retiree health benefits.[6/] The 1978 and 1981 NBCWAs, however, contained "evergreen" clauses, which obligated the companies that signed those agreements to continue making contributions to the UMWA Plans for as long as those companies mined coal and successor NBCWAs required such contributions, even if the companies did not themselves sign the successor agreements. Once again, Massey's attempt

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[5/] For example, in 1980, an A.T. Massey subsidiary, Shannon Pocahontas Coal Co. ("Shannon"), purchased a mine in West Virginia from Allied Corporation ("Allied"). Allied was signatory to the 1978 NBCWA, Article I of which required that in any such sale the seller obtain the purchaser's agreement to assume the seller's obligations under the NBCWA. Despite Article I, Shannon signed an agreement with Allied that purported to relieve it of any retiree benefits obligations. When retiree health benefits were terminated, the UMWA sued Allied and Shannon. Shannon denied responsibility and argued that benefits should be provided by the 1974 Benefit Plan. The district court issued an injunction ordering Allied to provide health coverage until it secured Shannon's agreement to provide such coverage. The Fourth Circuit, sitting *en banc*, affirmed. *Allied Corp.*, 765 F.2d at 421.

[6/] Only one subsidiary of A.T. Massey, Omar Mining Company, signed the 1984 NBCWA. *A.T. Massey Coal Co. v. UMWA*, 799 F.2d 142, 144 (4th Cir. 1986).

to eliminate its participation in the UMWA Plans ended up in the federal courts, which held that Massey was responsible under the evergreen clauses for continuing contributions to the UMWA Plans. *See generally In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. 658, 668 (D.D.C. 1992), *aff'd sub nom. UMWA 1974 Pension Plan v. Pittston Co.*, 984 F.2d 469, 472 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993).[7/]

As companies such as A.T. Massey and its subsidiaries dumped their responsibility for retiree health benefits, or simply went out of business, the 1950 and 1974 Benefit Plans' funding bases eroded and the 1974 Benefit Plan, as an orphan plan, incurred additional liabilities. *See District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) (*Royal II*); *accord, UMWA v. Nobel*, 720 F. Supp 1169 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). Meanwhile, the Massey companies continued their efforts to circumvent the coal industry's multiemployer health system. For example, as late as 1988, A.T. Massey, on behalf of its subsidiaries, sought to have the Trustees of the 1974 Benefit Plan adopt a measure that would allow participation in the Plan on terms that did not conform to the NBCWA. *See In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. at 667 n.18. Such a proposal would have allowed the Massey companies to benefit from the multiemployer system, without paying the full cost. The Trustees rejected A.T. Massey's proposal. *Id.*

As a result of the dumping of retiree health care obligations, decisions such as *Royal* and *Nobel*, and efforts

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7/ The evergreen litigation involved, among others, a group of companies known as the Rawl Companies, which were subsidiaries of A.T. Massey. 782 F. Supp. at 667 n.18. Rawl Sales was both a counterclaim defendant and appellant in the proceedings below.

by employers such as A.T. Massey and its subsidiaries to manipulate the benefit system, employers that continued to participate in the UMWA benefit plans had to pay higher contributions to finance coverage for retirees who had been abandoned by their former employers. (App. 348, 388.) *See Templeton Coal Co. v. Shalala*, 882 F. Supp. 799, 808 (S.D. Ind. 1995), *aff'd sub nom. Davon v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996). The resulting crisis led directly to passage of the Coal Act.

After the Coal Act's enactment, SSA made assignments of Combined Fund beneficiaries to the Massey Companies in accordance with the provisions of the statute. (App. 472-484; *see also* App. 254-270; 531-624.) Petitioners do not challenge in this action the correctness of any of these assignments under the statutory criteria. As of the most recent plan year covered by the joint submission of the Massey Companies and the Trustees in the district court -- the plan year beginning October 1, 1999 -- the Massey Companies were assessed Combined Fund premiums for the following number of beneficiaries:

A.T. Massey	30
Massey Coal Services	2
Peerless Eagle	22
Tennessee Consolidated Coal	80.[8/]

[8/] The total number of retirees and dependents originally assigned to the Massey Companies by SSA was significantly higher. (*See* App. 254-270.) In many instances, however, SSA assigned a retired miner who was already deceased at the time the Combined Fund began providing benefits in February 1993. In such instances, no health care premium was assessed for the deceased miner; rather, SSA assigned the deceased miner to show the basis on which the miner's eligible dependents were assigned to one of the Massey Companies. The original total number of assignments made to the Massey Companies was 333, but even in the Combined Fund's first plan year, when the number of surviving beneficiaries was at its peak, the total number of beneficiaries for whom premiums were assessed was 231. This number has declined

As of July 27, 2001, the liability of the Massey Companies to the Combined Fund with respect to these disputed beneficiaries totaled $1,188,641.29, including interest. (App. 327.)

In July and August 1998, A.T. Massey and its subsidiaries asserted administrative challenges to the disputed assignments, arguing that there was no material distinction between the facts presented by *Eastern* and those relevant to the beneficiary assignments made to the Massey Companies. (App. 489-512.) SSA rejected these challenges in April 1999, concluding that, by contrast to the situation in *Eastern*, the Massey Companies are statutory related persons to, and members of a controlled group of corporations including, one or more 1974 or later NBCWA signatories. (App. 523-525.)

III. The *Eastern Enterprises* Decision

In *Eastern*, a sharply divided Court held that the Coal Act was unconstitutional as applied to the petitioner there. Eastern was a signatory to each NBCWA (or amendment) executed between 1947 and 1964. In 1963, Eastern began the transfer of its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). This transfer was completed by 1965. After enactment of the Coal Act, Eastern was assigned under 26 U.S.C. § 9706(a)(3) more than 1,000 Combined Fund beneficiaries based on miners' employment with Eastern prior to 1966 and Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. *Eastern*, 524 U.S. at 516-17. Eastern contended that these assignments violated the Takings and Due Process Clauses of the Fifth Amendment.

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each year, as the Combined Fund's beneficiary population has declined due to mortality.

The plurality concluded that the Coal Act should be reviewed under the Takings Clause, and that it effected an unconstitutional taking as applied to Eastern. 524 U.S. at 522-23 (plurality). Justice Kennedy dissented from the plurality's conclusion that the Takings Clause governed, but concluded that, as applied to Eastern, the Coal Act violated the Due Process Clause. *Id.* at 539-50 (Kennedy, J., dissenting in part and concurring in the judgment). The four dissenting Justices agreed with Justice Kennedy that the Coal Act should be analyzed under the Due Process Clause, but concluded that it did not violate due process principles. *Id.* at 553-68 (Breyer, J., dissenting). At the same time, although the four Justices in the plurality declined to reach the issue, they expressed serious misgivings "about using the Due Process Clause to invalidate economic legislation." *Id.* at 537 (plurality).

It is undisputed that all nine of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly contemplated lifetime health benefits for retired miners and their dependents. 524 U.S. at 509, 530, 535 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment), 553 (Stevens, J., dissenting). The five Justices who combined to declare the Coal Act unconstitutional as applied to Eastern concluded that the negotiation of the 1974 NBCWA was the watershed event in which an explicit reference to lifetime retiree health benefits was first included in the collective bargaining agreement. Because the plurality and Justice Kennedy considered Eastern as an employer that left the coal industry in 1965 and did not sign the 1974 and later NBCWAs, the plurality viewed the Coal Act as imposing a burden on Eastern "unrelated to any commitment that the employer[] made," *id.* at 537, and Justice Kennedy viewed Eastern as "not responsible for the expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Id.* at 550. Because Eastern sold its subsidiary

EACC in 1987, well before the July 20, 1992 date for determining "related person" status under the statute, the plurality noted that Eastern's relationship with EACC did not bear on Eastern's liability under the Coal Act. *Id.* at 530. Thus, the Court did not confront any situation in which, as here, a coal operator was a "related person" to, and a member of a "controlled group" of companies with, one or more other companies that signed the 1974, 1978, 1981, and 1984 NBCWAs.

IV. This Litigation

On January 29, 1999, the Massey Companies filed a six-count complaint against the Commissioner of Social Security and the Trustees of the Combined Fund, challenging the constitutionality of the Coal Act under the Takings Clause and the Due Process Clause of the Fifth Amendment. In addition, petitioners asserted -- in a claim purely derivative from their constitutional argument -- that, by refusing to withdraw the challenged beneficiary assignments after *Eastern*, SSA violated Section 9706(f) of the Coal Act and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (App. 23-53.) The Trustees filed counterclaims against not only the Massey Companies but also Massey's Related Persons. The counterclaims sought a declaration that the Coal Act is constitutional as applied to Massey, as well as an injunction requiring Massey and its Related Persons to pay the premiums due the Combined Fund under the Coal Act. (App. 65-111.)

On July 19, 2001, the district court granted SSA's motion for summary judgment and held that the assessment of premiums against the Massey Companies was "not in contravention of the Supreme Court's holding in *Eastern Enterprises*." (Pet. App. B-41.) The district court denied without prejudice the Combined Fund's counterclaims for damages and injunctive relief. (Pet. App. B-41 to B-42.) After the Trustees moved to alter or amend the judgment,

Massey and the Trustees reached agreement on the amount owed by Massey, and the district court entered an order incorporating a stipulation between Massey and the Trustees regarding the Massey Companies' liability for Coal Act premiums. (Pet. App. C-1.)

The court of appeals affirmed. Holding that Massey could prevail only if it stood in a position "substantially identical" to that of Eastern, the court concluded that Massey could not satisfy that standard. (Pet. App. A-20, A-23.) The court explained (*id.* at A-25):

> [T]he Act gathers the Massey Plaintiffs together with the other members of the Massey Group for purposes of determining Combined Fund liability. Regardless of how members of the Group might prefer to be viewed, Congress has, for our purposes, effectively designated these "related persons" as a single legal entity under the Coal Act. Consequently, in evaluating whether the Massey Plaintiffs' experiences in the coal industry are substantially identical to those of Eastern, we may not artificially segregate those plaintiffs from the other members of the Massey Group. Rather, we must analyze the experiences of the Massey Group as "related persons," i.e., as a whole.

The court ruled that the position of the Massey Companies, viewed from the perspective of the Coal Act's "related person" provisions, is "easily distinguishable" from that of Eastern. (Pet. App. A-26.)

ARGUMENT

The court of appeals' decision is correct and further review is not warranted. In sustaining the validity of the Coal Act as applied to coal operators like the Massey Companies that are statutory "related persons" to companies

that signed the 1974 and later NBCWAs, and concluding that such operators are not "substantially identical" to Eastern, the court of appeals reached the same result as the Third Circuit. *See Berwind Corp. v. Commissioner of Social Security,* 307 F.3d 222 (3d Cir.), *cert. pending,* No. 02-995 (docketed Dec. 31, 2002); *Shenango Inc. v. Apfel, et al.*, 307 F.3d 174 (3d Cir. 2002); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999); *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161 (3d Cir.), *cert. denied*, 528 U.S. 1003 (1999). As these decisions recognize, *Eastern* does not extend to entities like the Massey Companies. Congress rationally determined that such entities, based on their status as "related persons" to 1974 or later NBCWA signatories, should be treated as part of a single corporate group that collectively made the very commitments that all Members of the Court in *Eastern* regarded as adequate constitutional justification for the exercise of legislative power in the Coal Act. *Eastern* therefore does not entitle the Massey Companies to relief.

The Massey Companies are wrong in suggesting that there is a "need" for this Court to guide the lower federal courts in applying decisions in which neither the rationale of a plurality of Justices nor that of a Justice concurring in the judgement is a logical subset of the other. *See, e.g., Marks v. United States*, 430 U.S. 188, 193 (1977). Numerous courts, as well as SSA, have properly applied *Eastern* in addressing subsequent Coal Act challenges by other assigned operators. There is no conflict among the circuits either as to the proper interpretation of *Eastern* or as to the proper methodology generally for dealing with cases in which there is no opinion for the Court. Review is not warranted.

I. THE MASSEY COMPANIES ARE NOT "SUBSTANTIALLY IDENTICAL" TO EASTERN

The Massey Companies erroneously claim that they are like Eastern, and that the Fourth Circuit, by relying on a "statutory definition" to create a "dispositive distinction" (Pet. 17), ignored the concerns expressed by the plurality and Justice Kennedy in *Eastern* over the imposition of Coal Act liability on a pre-1974 NBCWA signatory. The Massey Companies, however, contort the meaning of *Eastern* by dismissing the controlled group liability provisions of the Coal Act and attempting to cobble together from the plurality opinion and Justice Kennedy's opinion some sort of least-common-denominator constitutional theory that turns not on any specific constitutional provision but rather on Massey's own musings about what animated five Justices in *Eastern*.

The Massey Companies tried unsuccessfully in the district court and the court of appeals to contend that the contractual commitments of their related persons, all undertaken under the supervision of corporate parent A.T. Massey, should be ignored in assessing the validity of applying the Coal Act to petitioners. The argument has not improved with repetition. Massey has not explained why its own internal corporate machinations should control the outcome of an as-applied challenge to the constitutionality of a federal statute. If the entire A.T. Massey family of companies were a single corporate entity, there would be no question under *Eastern* that the Coal Act properly could be applied to that entity. Massey disclaims any challenge to the validity of the Coal Act's related person provisions (Pet. 21 n.11), and it is clear in any event that Congress, in assessing liability under the statute, is not limited by Massey's own business decisions to multiply subsidiaries, change corporate names, and allow some companies to go out of business while others sign the latest collective bargaining agreements. In short, Massey's own self-serving internal maneuverings

cannot insulate selected corporate entities from the legislative power of Congress.

A. Petitioners Are Not Similarly Situated To Eastern

Despite the Massey Companies' contention, *Eastern* does not support their position. The plurality and concurring opinions in *Eastern* both proceeded on the basis that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 524 U.S. at 516 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment). Members of the Massey Companies' controlled group of corporations, by contrast, actively mine coal today and signed the 1974, 1978, 1981, and 1984 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. *See*, *e.g.*, 524 U.S. at 530 (plurality opinion) (the 1974, 1978, and later NBCWAs "first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members."); *id.* at 550 (Kennedy, J., dissenting in part and concurring in the judgment) (Eastern "was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business."); *id.* at 553 (Stevens, J., dissenting) (the "implicit agreement [in the industry to provide retiree health care benefits] was made explicit in 1974"). The Massey Companies do not dispute this. (*See* Pet. 5.)

The 1974, 1978, and subsequent NBCWAs thus created in retired coal miners a reasonable expectation of lifetime health benefits. As the D.C. Circuit said in *Association of Bituminous Contractors, Inc. v. Apfel ("ABC")*, 156 F.3d 1246, 1257 (D.C. Cir. 1998), "[t]he clear implication of each opinion in *Eastern Enterprises* is that

employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." The Massey Companies, therefore, by virtue of their relationship to other members of their controlled group of corporations that signed the 1974, 1978, 1981, and 1984 NBCWAs that fostered an expectation of lifetime health coverage, cannot avoid their Coal Act liabilities by claiming that they are substantially identical to Eastern.

The Massey Companies dismiss this distinction by claiming either that they themselves never signed a NBCWA or that, like Eastern, they last signed a coal wage agreement at least ten years before the 1974 NBCWA. On this basis, petitioners claim that the "Coal Act imposes no less a retroactive burden" on them as it did on Eastern. (Pet. 17.) The Massey Companies avoid any argument specifically addressed to either the Takings Clause or the Due Process Clause, and instead seek to amalgamate the two provisions into a general assertion of unconstitutionality based on a false claim of identity with Eastern. (Pet. 18.)

Such amalgamation of different constitutional provisions is not the way courts determine the validity of statutes. As the D.C. Circuit explained in rejecting a similar claim that *Eastern* requires that the Coal Act be held generally "unconstitutional:"

> We begin our analysis with a bedrock principle of constitutional adjudication . . . . The Constitution prohibits certain governmental action through specific clauses . . . . Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses. . . . We certainly will not apply a takings analysis to resolve a due

> process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.

ABC, 156 F.3d at 1253-54. Massey's arguments suffer from the same flaw.

B. Unlike Eastern, The Massey Companies Are Related Persons To Other Members Of The Massey Controlled Group Of Corporations That Signed 1974 Or Later NBCWAs

The Massey Companies argue that the court of appeals erred by relying on the Coal Act's "related person" provisions in rejecting petitioners' constitutional challenge. As the court of appeals recognized, however, the scope of Congress's legislative authority is not bounded by shifting corporate forms subject to private manipulation, and Congress was entitled, in fixing Coal Act liability, to focus on the "collective experience" of a "'controlled group' rather than on the particular experiences of ever-shifting member entities." (Pet. App. A-24.) Because the Massey Companies' liability derives from the statute as a whole, including the "related person" provisions, the court of appeals correctly concluded that the Massey Companies and Eastern are not substantially identical.

Unlike Eastern, the Massey Companies are "related persons" to at least a dozen companies that did sign the 1974 and later NBCWAs and thus contributed to the creation of a reasonable expectation of lifetime health benefits, not merely for their own retirees but for all beneficiaries of the collectively bargained multiemployer system. Whereas Eastern sold its interest in its coal mining subsidiary, EACC, in 1987, and thus was not a "related person" to EACC or any other post-1974 NBCWA signatory, the Massey Companies remain related persons even to this day to other coal mining companies that did sign the 1974 and later NBCWAs. Thus,

unlike Eastern, the Massey Companies, as the court of appeals held, cannot portray themselves as entities unconnected with the UMWA multiemployer health care system in 1974 and thereafter. Instead, the Massey Companies have a long association with the UMWA Plans and with the crisis that jeopardized the entire multiemployer health care system before the enactment of the Coal Act. Because corporations related to the Massey Companies signed the 1974 or later NBCWAs, and because the Massey Companies are part of the same controlled group of corporations with such post-1974 signatories, the Massey Companies legitimately can be treated as if they too made the commitments reflected in 1974 and later agreements, and their liability for health care premiums under the Coal Act should be evaluated on that basis, as the courts below correctly held.

The Massey Companies contend, however, that the Coal Act's "related person" provisions should have "no greater bearing on the constitutionality of the [Coal Act] assignments than did Eastern's corporate relationship to EACC from 1974 through 1987." (Pet. 23.) This argument ignores the fact that neither the plurality nor Justice Kennedy in *Eastern* addressed the operation of the "related person" provisions of the statute. It also disregards the central role that "controlled group" liability plays under various statutory schemes, including the Internal Revenue Code and pension and benefits law generally (*see, e.g.*, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1132 *et seq.*).

First, because Eastern sold its subsidiary EACC in 1987, five years before the date that Congress chose for determining "related person" status under the Coal Act, the plurality and Justice Kennedy in *Eastern* did not consider the constitutionality of the "related person" provisions of the statute. The plurality expressly stated that Eastern did not

qualify as a related person to a post-1974 signatory employer and that the statute did *not* impose liability on Eastern as a related person to such an employer. As a consequence, neither the plurality nor Justice Kennedy thought it relevant that EACC, while still wholly owned by Eastern, signed the NBCWAs of 1974, 1978, 1981, and 1984. *See, e.g.*, 524 U.S. at 530 (plurality opinion).

The Massey Companies' suggestion that the result in *Eastern* would not have been different if Eastern had been tied to a "related person" under the Coal Act that had signed a 1974 or later NBCWA is simply wrong. Unlike the imposition of liability on Eastern, controlled group liability under ERISA and MPPAA routinely has withstood constitutional attack. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing*, 691 F. Supp. 6, 27 (W.D. Mich. 1987) (rejecting Takings Clause challenge to controlled group liability under MPPAA), *aff'd*, 892 F.2d 1043 (6th Cir. 1990); *Connors v. Brady-Cline Coal Co.*, 668 F. Supp. 5, 9 n.4 (D.D.C. 1987) (rejecting due process challenge to controlled group liability under MPPAA); *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979) (rejecting Takings Clause challenge to controlled group liability upon termination of single employer pension plan under 29 U.S.C. § 1362), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See also Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995) (sustaining liability of sister banks for each other's debts under FIRREA), *cert. denied*, 519 U.S. 810 (1996); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995) (same). Unless the plurality opinion and Justice Kennedy's opinion in *Eastern* somehow could be said to have overruled *sub silentio* the long line of cases upholding controlled group liability – a proposition that even the Massey Companies do not advance – then controlled group liability is constitutional here as well.

Further, by incorporating "controlled group" liability into the Coal Act, Congress made a rationale choice "to apportion liability among all the companies that collectively made the promise" of lifetime health benefits to the affected miners. *In re Chateaugay Corp.*, 53 F.3d 478, 491 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995). The Coal Act holds the entire controlled group liable for the legitimate expectations to which any of the group's members contributed. Through these provisions, Congress sought to collapse internal corporate distinctions and treat such groups of companies under common control as single entities for purposes of liability. Congress decided, in other words, that it should not matter in the financing of retiree health care that the corporate parent, A.T. Massey, has chosen over the years to create scores of subsidiaries and a Byzantine corporate structure, while other coal operators have concentrated all of their coal mining activities in one or two or three corporate entities.[9/] The "related person" provisions of the Coal Act simply cut through these corporate forms and impose liability on the overall enterprise. They thus avoid the need to trace the history of shifting entities and to penetrate convoluted structures entirely under private control.

9/ The history of the actual employers of the retired miners assigned to A.T. Massey and Massey Coal Services illustrates this point well. According to A.T. Massey's own corporate counsel, these retired miners worked for either Merrill Coal Company, Gay Mining, or the Massey Coal Mining Company. (App. 513-516.) Apparently, in 1958, A.T. Massey merged Merrill into Gay Mining, which caused Merrill to cease its existence. Upon the merger, Gay Mining changed its name to the Massey Coal Mining Company and operated as such for approximately 17 years. For some reason, however, A.T. Massey then changed the Massey Coal Mining Company's name to Ben Creek Coal in 1977. Although this particular entity, by whatever name, last signed a coal wage agreement in 1964, Ben Creek still exists and remains a part of the A.T. Massey family.

II. CONTRARY TO MASSEY'S ASSERTION, THIS CASE REFLECTS NO NEED TO GIVE "GUIDANCE" TO THE LOWER COURTS IN APPLYING DECISIONS THAT DO NOT PRODUCE A MAJORITY OPINION.

The Massey Companies begin their argument (Pet. 13-16) with an abstract discussion of the methods by which the lower federal courts apply decisions of this Court when there is no majority opinion. This discussion, largely hypothetical and divorced from the question actually presented, does not provide any basis for review. Petitioners do not claim that the lower courts have disagreed regarding the proper procedure for applying this Court's decisions, and they do not cite any conflict regarding the application of *Eastern* or any other decision in which there was no opinion for the Court.

This Court held in *Marks v. United States*, 430 U.S. 188 (1977), that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193 (internal quotation and citation omitted). Massey does not suggest, much less provide any evidence, that courts have had difficulty in applying this principle. Moreover, as Massey itself agrees (Pet. 14), the approach described in *Marks* is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another -- only where one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 778 (D.C. Cir. 1991) (*en banc*); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). As the cited cases show, the courts of appeals have recognized as much. Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the

Court." *Rappa*, 18 F.3d at 1058; *see also King*, 950 F.2d at 782. In these circumstances, the lower courts correctly have provided the benefit of this Court's rulings to other parties in the same position as the party that prevailed in this Court. Massey does not, and could not, suggest that any other approach is warranted.

The court of appeals here correctly observed that the plurality opinion and Justice Kennedy's opinion in *Eastern* involve "no theoretical overlap" and that "'Justice Kennedy's substantive due process reasoning is not a narrower' ground that we might take to constitute the controlling holding.'" (Pet. App. A-19.) (citation omitted.) Both the D.C. Circuit and the Third Circuit have come to the same conclusion. *Unity*, 178 F.3d at 658 (same); *ABC*, 156 F.3d at 1255 ("as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis."). In such circumstances, only the result in the case before this Court is binding, and only in substantially identical cases. (Pet. App. A-19); *Unity*, 178 F.3d at 659; *ABC*, 156 F.3d at 1254-55. SSA subsequently has applied *Eastern* in approximately 122 similar cases, voiding the assignments made to coal operators that, like Eastern, did not sign a 1974 or later NBCWA and were not members of a controlled group as of July 20, 1992 that contained any such signatory.

At the end of the day, Massey's argument reduces to the claim not that there is any problem with the method by which lower courts apply this Court's decisions but rather that, in Massey's view, the district court and court of appeals in this case erred in concluding that the Massey Companies are not "substantially identical" to Eastern for Coal Act purposes. *See* Pet. 16 ("a properly applied 'substantially identical' test is suited to the task at hand"). For all the reasons discussed above and in the lower courts' opinions, however, the Massey Companies are not substantially identical to Eastern, and the court of appeals therefore

properly declined to relieve petitioners of their Coal Act liability. This case provides no occasion for giving the lower courts further instruction in the proper meaning of *Marks* and its progeny.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Subtitle C—Health Care of Coal Miners

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

"CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS

"Subchapter A—Definitions of General Applicability

"Sec. 9701. Definitions of General Applicability.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404(c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan described in section 404 (c) (or a contination thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3) 1974 UMWA PENSION PLAN.—The term '1974 UMWA Pension Plan' means a pension plan described in section 404 (c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA BENEFIT PLAN.—The term '1992 UMWA Benefit Plan' means the plan referred to in section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means a person which is or was a signatory to a coal wage agreement.

"(2) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under common control (as determined under section 52 (b)) with such signatory operator; or

"(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

"(3) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a Signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

"(4) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(5) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) Business.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"(a) ESTABLISHMENT.

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

"(3) TREATMENT OF PLAN.—The Combined Fund shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c) (5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(l)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

"(b) BOARD OF TRUSTEES.

"(1) IN GENERAL. For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"(C) two individuals designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the

BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

"(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. Plan Benefits.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis.—The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), the coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums, determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined under subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) is derived from amounts described in section 9704 (e)(3)(B)(i), and

"(II) the trustees elect to use to pay benefits for the current year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

"(3) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

"(4) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704 (a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

"PART II—FINANCING

"Sec. 9704. Liability of Assigned Operators.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

"(A) the amount determined by dividing

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(3) ADJUSTMENTS FOR MEDICARE REDUCTIONS.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703 (c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be

proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

"(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703 (b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

"(ii) interest credited under paragraph (2) (B) for the plan year or any preceding plan year.

"(C) NO AUTHORITY FOR INCREASED PAYMENTS.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703 (b)(2).

"(f) APPLICABLE PERCENTAGE.—For purposes of this section

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c) (6) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.

"(1) IN GENERAL.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(2) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.

"(1) 1988 AGREEMENT OPERATORS.

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and

administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

"(ii) DEFICIT PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

"(iii) LIMITATION.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

"(iv) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"(3) STARTUP COSTS.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

"Sec. 9705. Transfers.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN.—

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February l, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a) (3) and the death benefit premium under section 9704(a) (2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER.—

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA

Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1)—

"(i) Shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

"(5) TREATMENT OF TRANSFER.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND.—

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a) (3) of each assigned operator for the plan year in which transferred.

"Sec. 9706. Assignment of Eligible Beneficiaries.

"(a) In GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any

related person with respect to which) remains in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator, shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement, shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, and instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and

Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section:

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined

Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under section (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III-ENFORCEMENT

"Sec. 9707. Failure to Pay Premium

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30 day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary

determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

"Subchapter C—Health Benefits of Certain Miners

"PART I—INDIVIDUAL EMPLOYER PLANS

"Sec. 9711. Continued Obligations of Individual Employer Plans.

"(a) COVERAGE OF CURRENT RECIPIENTS.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual

employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

"(b) COVERAGE OF ELIGIBLE RECIPIENTS.—

"(1) IN GENERAL.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

"(2) COVERAGE.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

"(c) JOINT AND SEVERAL LIABILITY OF RELATED PERSONS.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the

provision of health care coverage described in subsection (a) or (b).

"(d) MANAGED CARE AND COST CONTAINMENT.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

"(e) TREATMENT OF NONCOVERED EMPLOYEE.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

"(g) RULES APPLICABLE TO THIS PART AND PART II.—For purposes of this part and part II—

"(1) SUCCESSOR.—The term 'last signatory operator' shall include a successor in interest of such operator.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor

shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

"PART II-1992 UMWA BENEFIT PLAN

"Sec. 9712. Establishment and Coverage of 1992 UMWA Benefit Plan.

"(a) CREATION OF PLAN.—

"(1) IN GENERAL.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

"(2) TREATMENT OF PLAN.—The 1992 UMWA Benefit Plan shall be—

"(A) a plan described in section 302 (c) (5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c) (5)).

"(B) an employee welfare benefit plan within the meaning of section 3 (1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(l)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(b) COVERAGE REQUIREMENT.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

"(2) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means an individual who—

"(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

"(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

"(c) HEALTH BENEFITS.

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) MANAGED CARE.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

"(3) MAJOR ELEMENTS OF RULES.—Elements described in this paragraph are—

"(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

"(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

"(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

"(D) utilizing, in the claims payment function 'appropriateness of service' protocols under title XVIII of the Social Security Act if more stringent,

"(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

"(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

"(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

"(4) LAST SIGNATORY OPERATORS.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

"(5) STANDARDS OF QUALITY.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established

"(A) by the settlors, or

"(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

"(d) GUARANTEE OF BENEFITS.—

"(1) IN GENERAL.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

"(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

"(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b) (2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

"(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

"(2) ADJUSTMENTS.—The 1992 UMWA Benefit Plan shall provide for—

"(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

"(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

"(3) ADDITIONAL LIABILITY.—Amy last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

"(4) JOINT AND SEVERAL LIABILITY.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

"(5) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(6) 1988 LAST SIGNATORY OPERATOR.—For purposes of this section, the term '1988 last signatory operator' means a last signatory operator which is a 1988 agreement operator.

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

"Sec. 9722. Sham Transactions.

"If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

(b) AMENDMENTS TO SURFACE MINING ACT.—

(1) EXTENSION OF FEE PROGRAM.—Section 402 (b) of the Surface Mining Control and Reclamation Act of 1977 (30

U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004".

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection

"(h) TRANSFER OF FUNDS TO COMBINED FUND.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3) (A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2) (B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g) (1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".

(3)

Supreme Court, U.S.
FILED

MAR 24 2003

No. 02-956

In the Supreme Court of the United States

A.T. MASSEY COAL COMPANY, INC., ET AL.,
PETITIONERS

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Commissioner of Social Security was constitutionally required under *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), to void assignments to petitioners of liability for retired miners' benefits under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, even though, when that Act was passed, petitioners were members of a commonly controlled group of corporations that both employed the miners and promised to provide them lifetime health benefits.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 305 F.3d 226. The opinion of the district court (Pet. App. B1-B42) is reported at 153 F. Supp. 2d 813. The order of the district court amending its judgment (Pet. App. C1-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. The petition for a writ of certiorari was filed on December 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, in response to a financial crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of health-care benefits. Those benefits had been promised to retired coal miners in a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements (NBCWAs) negotiated between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators' Association (BCOA), a multi-employer bargaining association. See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion); Pet. App. A6-A9.

In the 1930s, as the UMWA organized workers in the coal industry, heath-care benefits became an important issue in collective bargaining. In 1947, the UMWA and several coal operators entered into a NBCWA in which the operators agreed to provide health-care benefits to miners and their dependents. The 1947 NBCWA did not, however, promise specific benefits or guarantee lifetime benefits. The UMWA and the BCOA entered into similar agreements in subsequent years. See *Eastern Enterprises*, 524 U.S. at 504-509 (plurality opinion); Pet. App. A7.

In 1974, the UMWA and the BCOA entered into a NBCWA that, for the first time, explicitly promised lifetime health benefits to miners and their dependents. In 1978, the UMWA and the BCOA entered into a new NBCWA in which signatory operators agreed to provide lifetime benefits for their own active and retired employees as well as for "orphaned" miners whose employers had ceased coal operations or withdrawn from the NBCWAs. Signatory employers were re-

quired to contribute enough to pay for the promised benefits and to remain liable as long as they remained in the coal industry. See *Eastern Enterprises*, 524 U.S. at 509-511 (plurality opinion); Pet. App. A7-A9.

In the 1980s and 1990s, the financial stability of the private multi-employer plans that had been established to finance those benefits was undermined by increasing health-care costs and the termination of coal operators' contribution obligations as operators switched to non-union employees or left the coal industry altogether. As more coal operators withdrew from the plans, the remaining operators were forced to bear more of the costs, which in turn led to even more defections and created a downward spiral. See *Eastern Enterprises*, 524 U.S. at 511-514 (plurality opinion); Pet. App. A9.

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to * * * retirees," to "allow for sufficient operating assets for such plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, Title XIX, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established a private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund). The Combined Fund provides health-care benefits to individuals who, at the time that the Coal Act was enacted, were receiving benefits from the multi-employer plans. See 26 U.S.C. 9702, 9703(f).

The Combined Fund is financed principally by premiums paid by the "signatory operator[s]"—or "related person[s]" of those operators—that formerly employed

the retired miners who are beneficiaries of the Combined Fund. 26 U.S.C. 9704, 9706(a). The Coal Act defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1).

b. The Coal Act vests the Commissioner of Social Security (Commissioner) with the task of assigning retired miners who are eligible for benefits from the Combined Fund to signatory operators or related persons of those operators. 26 U.S.C. 9706(a). The Coal Act provides for assignments to be based on how long and how recently a miner worked for a particular employer and on whether the employer signed a NBCWA in 1978 or thereafter. See 26 U.S.C. 9701(b)(1) and (c)(1), 9706(a). Any signatory operator that receives business revenue, "whether or not in the coal industry," may be assigned beneficiaries under the Coal Act. 26 U.S.C. 9701(c)(7), 9706(a).

The Coal Act also imposes shared responsibility on a signatory operator's "related persons," which are defined to include members of a commonly controlled group of corporations that includes the signatory operator, businesses under common control with the signatory operator, and successors in interest to a related person. 26 U.S.C. 9701(c)(2)(A). Related persons may be directly assigned liability for premiums for a retired miner and his dependents. See 26 U.S.C. 9706(a). In addition, related persons are jointly and severally liable for the premiums of the assigned operator. See 26 U.S.C. 9704(a). For assignment purposes, "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. 9706(b)(1)(A).

If a retired miner cannot be assigned to any coal operator or related person that remains in business, the miner is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d). The Coal Act provides several sources of funding for the benefits of unassigned beneficiaries, including transfers from the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund) and, if necessary, assessments of an "unassigned beneficiary premium" from coal operators and related persons that have been assigned retired miners. See 26 U.S.C. 9704(a), 9705(a) and (b).[1]

c. In *Eastern Enterprises*, this Court invalidated the Commissioner's assignment to Eastern of responsibility for the Combined Fund premiums of more than 1000 retired miners and their beneficiaries that were estimated to total between $50 million and $100 million. The Commissioner had made those assignments under 26 U.S.C. 9706(a)(3), the third tier of the Coal Act's assignment hierarchy, because Eastern had employed the miners and had signed NBCWAs in the 1960s.[2]

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[1] The AML Fund was established by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, for the purpose or reclaiming and restoring land and water resources adversely affected by past coal mining. See 30 U.S.C. 1231(c). The AML Fund is financed by fees assessed on coal operators for each ton of coal produced. See 30 U.S.C. 1232(a). To date, AML Fund transfers have been sufficient to avoid the assessment of an unassigned beneficiary premium.

[2] Although Eastern had a subsidiary, Eastern Associated Coal Corporation (EACC), that had signed NBCWAs in 1974 and thereafter, Eastern sold all of its interest in EACC in 1987. 524 U.S. at 516 (plurality opinion); see 26 U.S.C. 9701(c)(2)(B) (related person status is determined as of July 20, 1992, unless coal operator went out of business earlier). Because EACC was not a "related person" to Eastern within the meaning of the Coal Act, the Commissioner

A plurality of the Court concluded that the challenged assignments violated the Just Compensation Clause of the Fifth Amendment. The plurality reasoned that the Coal Act "place[d] a severe, disproportionate, and extremely retroactive burden on Eastern." 524 U.S. at 538. The plurality emphasized that Eastern had not engaged in coal mining since 1965, had employed the assigned miners "some 30 to 50 years before" the enactment of the Coal Act, and had not signed "the 1974, 1978, or subsequent NBCWA's," which the plurality described as the "agreements that first suggest an industry commitment to the funding of lifetime health benefits." *Id.* at 530-531. The plurality noted that, under the earlier NBCWAs that Eastern had signed, a coal operator's obligation was limited to a fixed royalty, withdrawal was permitted, and miners were provided with "far less extensive" benefits that "were fully subject to alteration or termination." *Id.* at 531; see *id.* at 535-536.

Justice Kennedy concurred in the judgment. 524 U.S. at 539-550. Justice Kennedy disagreed with the plurality's takings analysis, but concluded that the challenged assignments violated the Due Process Clause. Justice Kennedy reasoned that the Commissioner's assignments to Eastern based on "events which occurred 35 years ago" had "a retroactive effect of unprecedented scope" that could not be justified as "remedial," because those assignments were designed to satisfy a promise to provide lifetime health benefits "made long after Eastern left the coal business." *Id.* at 549-550.

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had not made assignments to Eastern based on its relationship to EACC. See 524 U.S. at 530 (plurality opinion).

3. Petitioner A.T. Massey Coal Company, Inc. (Massey) is a holding company that has numerous wholly owned subsidiaries, many of which have engaged or are engaging in coal mining operations. C.A. App. 24, 26-28, 161-162. Massey and its affiliates "function[] as a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters." *A.T. Massey Coal Co.* v. *International Union*, 799 F.2d 142, 144 (4th Cir. 1986), cert. denied, 481 U.S. 1033 (1987). Massey and three of its subsidiaries, petitioners here, have stipulated that they are members of a "controlled group of corporations" within the meaning of the Coal Act. Pet. App. A12, B22.

a. The Commissioner assigned petitioners responsibility under the Coal Act for the health-care premiums of 333 retired miners and their dependents. After *Eastern Enterprises*, petitioners asked the Commissioner to void their assignments, arguing that they did not themselves sign NBCWAs in 1974 or thereafter, and thus were similarly situated to Eastern. The Commissioner declined to void petitioners' assignments because other wholly owned Massey subsidiaries, which are petitioners' "related persons" under the Coal Act, signed the 1974 NBCWA or subsequent NBCWAs promising to provide lifetime health-care benefits to all retired miners. C.A. App. 523-525.[3]

b. Petitioners brought suit against the Commissioner and the trustees of the Combined Fund, contending that their assignments were invalid under *Eastern Enterprises*. The district court granted sum-

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[3] The Commissioner voided assignments to other coal operators and related persons that were determined to be similarly situated to Eastern. See Pet. App. A16.

mary judgment in favor of the Commissioner. Pet. App. B1-B42.

The district court observed that other courts presented with such challenges have "unanimously" concluded that the "splintered decision in *Eastern Enterprises*," in which no single rationale commanded the support of five Justices, "mandates judgment for the plaintiffs only if they stand in a *substantially identical* position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." Pet. App. B28 (quoting *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999)). The court found that standard was not satisfied here. The court explained that petitioners, unlike Eastern, were "related persons" to coal operators that signed the 1974 NBCWA or subsequent NBCWAs that explicitly promised lifetime health-care benefits. See *id.* at B29. The court concluded that "a company that is assigned liability for premiums under the Coal Act based on its status as a 'related person' to a 1974 or subsequent NBCWA signatory is not substantially identical to Eastern because *Eastern Enterprises* did not address related person liability." *Id.* at B38.

c. The court of appeals affirmed. Pet. App. A1-A26.

The court of appeals identified the "single issue" raised by petitioners on appeal as "whether [their] assignments are unconstitutional under *Eastern Enterprises*." Pet. App. A18. The court of appeals, like the district court, held that *Eastern Enterprises* would require the invalidation of the challenged assignments only if petitioners are in a "substantially identical" position to that of Eastern. *Id.* at A19. The court observed that both the plurality opinion and the concurring opinion in *Eastern Enterprises* treated as

critical the fact that Eastern had not signed the 1974 NBCWA or any subsequent NBCWA promising lifetime health-care benefits. *Id.* at A20. Accordingly, the court concluded that "a coal operator stands in a position 'substantially identical' to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs." *Ibid.*

The court of appeals held that petitioners were not "substantially identical" to Eastern in that critical respect. Pet. App. A23-A26. The court explained that, although petitioners themselves had not signed the 1974 NBCWA or subsequent NBCWAs, they are part of a controlled group of corporations that had done so. The court noted that the Coal Act treats employment by any member of a controlled group as employment by all members of the group. *Id.* at A23 (citing 26 U.S.C. 9706(b)(1)(A)). The court also observed that treating all members of a controlled group as "a single entity" is consistent with the statutory purpose of assuring that benefit obligations would not be affected by changes in corporate form. *Id.* at A24.

The court of appeals rejected the argument that petitioners are in a "substantially identical" position to Eastern because Eastern had a wholly owned subsidiary, Eastern Associated Coal Corporation (EACC), that signed NBCWAs in 1974 and thereafter. The court explained that Eastern and EACC were not "related persons" within the meaning of the Coal Act because Eastern had sold EACC before July 20, 1992, the date on which the Coal Act was passed and the date as of which "related person" status is determined under 26 U.S.C. 9701(c)(2)(B). Accordingly, Eastern's liability for Coal Act premiums could not have been based on its relationship to EACC. Pet. App. A24-A25. The court, "tak[ing] the parties as the Act defines them," recog-

nized that Eastern, by virtue of its pre-Act sale of EACC, was "a discrete entity," whereas petitioners, by virtue of their continuing relationship, are "gather[ed] * * * together with the other members of the Massey Group for purposes of determining Combined Fund liability." *Id.* at A25.

Judge Niemeyer concurred in part in the judgment and dissented in part, expressing the view that the Coal Act assignments to three of the four petitioners "are unconstitutional by virtue of the Supreme Court's holding in *Eastern Enterprises*." Pet. App. A27.

ARGUMENT

Petitioners contend that the Commissioner was required to void their Coal Act assignments in light of *Eastern Enterprises* because "[t]he facts here are substantially identical to Eastern's in all material respects." Pet. 17. The court of appeals rejected that contention on the ground that petitioners' liability for Coal Act premiums, unlike Eastern's, was justified by their membership, at the time that the Coal Act was passed, in a commonly controlled group of corporations that both employed the particular retirees assigned to petitioners and promised lifetime health benefits to all retirees. That decision is correct, is consistent with the decisions of other courts of appeals, and presents no question of continuing importance. This Court's review is, therefore, not warranted.

1. Petitioners do not dispute that the court of appeals articulated the proper standard for determining whether *Eastern Enterprises* requires that their assignments be voided—namely, whether petitioners are in a "substantially identical" position to Eastern with respect to "the critical facts the plurality and Justice Kennedy relied on in reaching their respective

conclusions." Pet. 15, 16. They merely contend that the court of appeals misapplied that standard in this case. This Court ordinarily does not grant certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In any event, the court of appeals correctly held that petitioners are not similarly situated to the former coal operator in *Eastern Enterprises* so as to require invalidation of their assignments under the holding of that case.

a. In concluding that the assignments in *Eastern Enterprises* were unconstitutional, the plurality and concurring opinions emphasized that Eastern had not signed the 1974 NBCWA, which was the first to make an explicit promise of lifetime health-care benefits, or any subsequent NBCWA, and thus could not reasonably have contemplated being held responsible for providing such benefits. See 524 U.S. at 530 (plurality opinion) (explaining that Eastern had not "participated in negotiations nor agreed to make contributions" to satisfy the "industry commitment to the funding of lifetime health benefits" made in the 1974 and later NBCWAs); *id.* at 550 (Kennedy, J., concurring in the judgment) (reasoning that Eastern was "not responsible for [retired miners'] expectation of lifetime health benefits" because it did not sign NBCWAs in 1974 or thereafter).

Here, in contrast, petitioners could reasonably have anticipated that they would be required to provide lifetime health-care benefits for their retirees. That is because petitioners are (and at all relevant times have been) members of a commonly controlled group of corporations, other members of which signed the 1974 and subsequent NBCWAs promising lifetime benefits not only to their own retirees, but also to other retirees

who were "orphaned" by their employers. See Pet. App. A14 (identifying three such related companies); *id.* at B24 (identifying additional related companies). To be sure, petitioners might have hoped to avoid ever having to share in the obligations that their subsidiaries (in the case of petitioner Massey) or affiliates (in the case of the other petitioners) assumed by signing those NBCWAs. Petitioners could not, however, have had a "reasonable investment-backed expectation," *Eastern Enterprises*, 524 U.S. at 532 (plurality opinion), that they would never be required to provide the very benefits to their own retirees that their related companies had promised to *all* retirees.

b. Petitioners contend that they cannot meaningfully be distinguished from Eastern because, like petitioners, Eastern had an affiliate, EACC, that signed the 1974 and subsequent NBCWAs. See Pet. 20-24. As the plurality explicitly recognized in *Eastern Enterprises*, Eastern had sold EACC in 1987, five years before the enactment of the Coal Act and the date as of which the Coal Act determines "related person" status, so that "Eastern's liability under the Act [could] bear[] no relationship to its ownership of EACC." 524 U.S. at 516, 530; see 26 U.S.C. 9701(c)(2)(B). Accordingly, the Court had no occasion in *Eastern Enterprises* to consider whether the Constitution would bar assignment of responsibility to one member of a group of corporations that remained under common control on the date that the Coal Act was passed—and the date as of which "related person" status is determined—where other members of the group had promised lifetime benefits to all retired miners. See Pet. App. A25 (observing that "the *Eastern Enterprises* plurality expressly deferred to the delineation of entities that Congress chose to make in the Coal Act" and thus "examined Eastern's

experience in isolation" from EACC's). Here, in contrast, petitioners remain affiliated with the numerous "related persons" that promised lifetime health benefits to coal miners. The Coal Act permitted the Commissioner to take those "related persons" into account in ascertaining petitioners' liability.[4]

Nor is there anything unfair about treating all members of a commonly controlled group of corporations—indeed, one whose members operate as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters" (Pet. App. A12)—as a single entity for purposes of imposing liability for retirees' benefits under the Coal Act. It is reasonable to presume that the entire controlled group profited from the services

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[4] Petitioners dispute that their Coal Act liability is based in part on their membership in a controlled group of corporations that signed the 1974 NBCWA or later NBCWAs. See Pet. 19 & n.10. As the court of appeals recognized, however, the Commissioner sustained petitioners' assignments after *Eastern Enterprises* on that basis. See Pet. App. A16.

Petitioners also contend that the Commissioner lacked authority to maintain their assignments based on whether the controlled group, as a whole, employed the miners at issue and signed 1974 or later NBCWAs. See Pet. 22. That contention was not addressed by the court of appeals. It is, in any event, incorrect. The Coal Act repeatedly provides that formal distinctions among related companies may be disregarded. See 26 U.S.C. 9706(b)(1)(A) (coal miner's employment is attributable not only to the coal operator that directly employed him but also to any "related persons"); 26 U.S.C. 9704(a) (providing for assignment not only to the coal operator that employed a miner but also to related persons); 26 U.S.C. 9706(a) (providing that related persons are jointly and severally liable). The Commissioner's approach in this case constitutes a reasonable application of a statute that she is charged with implementing, and thus is entitled to judicial deference. See, *e.g.*, *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1271-1272 (2002).

rendered by its employees in return for its promises of lifetime benefits. That may well be why petitioner Massey allowed its subsidiaries to continue to make those promises throughout the 1970s and into the 1980s. Moreover, Congress's choice in the Coal Act to permit liability to be imposed not only on the direct employer but also on all sufficiently "related persons" was particularly justified given the evidence before it that coal operators' use of nominally separate companies had contributed substantially to the funding crisis that the Coal Act was intended to solve. See C.A. App. 408-409, 423, 431; see generally *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729-730 (1984) (recognizing that Congress ordinarily may impose retroactive liability on employers to fund employee benefits in pursuit of "a rational legislative purpose," such as to spread the cost of those benefits among all those "who have profited from the fruits of [the employees'] labors") (citation omitted); accord, *e.g.*, *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 646 (1993); *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

In sum, petitioners are not, as they claim, "substantially identical" to the former coal operator in *Eastern Enterprises* with respect to the "critical facts the plurality and Justice Kennedy relied on in reaching their respective conclusions." Pet. 15, 16. Accordingly, even if petitioners had some other basis on which to challenge their assignments, petitioners cannot validly challenge their assignments on the basis of *Eastern Enterprises* alone, and that is the only challenge they have preserved in this case.[5]

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[5] As the court of appeals recognized, the "single issue" raised by petitioners on appeal was "whether [their] assignments are

2. The Fourth Circuit's decision in this case does not conflict with the decision of any other circuit. Nor do petitioners contend otherwise.

Indeed, the Third Circuit has held, consistently with the Fourth Circuit here, that *Eastern Enterprises* does not require the invalidation of assignments to employers that are not themselves signatories of the 1974 NBCWA or a subsequent NBCWA, but that are the "related persons" of such signatories. See *Berwind Corp.* v. *Commissioner*, 307 F.3d 222, 235-236 (2002) (concluding that an employer's position "is materially different" from Eastern's when the employer's related person signed the 1974 NBCWA or a later NBCWA), petition for cert. pending, No. 02-995 (filed Dec. 24, 2002); *Shenango Inc.* v. *Apfel*, 307 F.3d 174, 186-187 (2002) (same). More generally, the D.C. Circuit has held that assignments based on participation in the 1974 NBCWA or a subsequent NBCWA distinguish a case from *Eastern Enterprises*, without attributing any significance to whether the NBCWA was signed by the party to which the assignment was made or by a related person. *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1257 (1998); accord *Unity Real*

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unconstitutional under *Eastern Enterprises*." Pet. App. A18. The court of appeals thus did not consider any other constitutional or statutory challenge to those assignments. See *id.* at B25 (district court characterizes "[t]he dispositive question" in the case as whether petitioners "are in a substantially identical position to the plaintiff in *Eastern Enterprises* such that the decision in *Eastern Enterprises* necessitates the conclusion that the Coal Act is unconstitutional as applied to [petitioners]"); *id.* at B26 (district court observes that petitioners could not prevail on any independent takings claim given that five Justices had rejected such a claim in *Eastern Enterprises*); *id.* at B39 n.17 (district court notes that petitioners had not raised any due process claim aside from reliance on *Eastern Enterprises*).

Estate Co. v. *Hudson*, 178 F.3d 649, 654-655, 658-674 (3d Cir.), cert. denied, 528 U.S. 963 (1999); *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 166-167, 169-174 (3d Cir.), cert. denied, 528 U.S. 1003 (1999).

The consistency of appellate decisions refutes petitioners' assertion that this Court's guidance is needed with respect to how *Eastern Enterprises* and "other similarly fragmented decisions" are to be applied. Pet. 16.

3. This Court issued its decision in *Eastern Enterprises* nearly five years ago. The Commissioner has long since decided which assignments should and should not be vacated based on the holding in that case. It is thus unlikely that cases such as this one challenging the Commissioner's implementation of *Eastern Enterprises* will continue to arise in the future. Moreover, as the elderly beneficiary population continues to decline as a result of mortality, petitioners and other assigned companies will have to pay premiums for fewer beneficiaries with each passing year. See Pet. App. A13 n.11 (noting that petitioners were responsible for the premiums of only 134 beneficiaries by the 1999 plan year). For these reasons as well, this case presents no question of continuing importance that warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-956 (A)

Supreme Court, U.S.
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In The
Supreme Court of the United States

A. T. MASSEY COAL COMPANY, INC., *et al.*,
Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION FILED BY FEDERAL RESPONDENT AND RESPONDENTS TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

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Caption of the cover contains all names.

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Respondents' position is that this Court would have decided *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), differently had Congress set the statutory date for establishing related person liability at July 20, 1987 (rather than July 20, 1992). *See* 26 U.S.C. § 9701(c)(2)(B). According to Respondents (and the court below) this is because application of a statutory definition that would brand Eastern a "related person" to 1974 signatory EACC would somehow have mitigated the extreme retroactive effect of the Act that was the basis for this Court's decision that the Coal Act was unconstitutional as applied to Eastern. If the Members of this Court agree with Respondents' view that the constitutional issues identified in the plurality and Justice Kennedy's opinions would not have existed had Congress set the statutory date for determining related person liability at July 20, 1987, then this Petition should be summarily rejected.

The happenstance of the statutory date for ascribing significance to common ownership is the only reason the Commissioner offered for her conclusion that Petitioners' situation is not substantially identical to Eastern's. This is a difference solely arising from a statutory distinction, however. It has no bearing on the constitutional analysis that underlies the opinions in *Eastern*. On the material facts (*i.e.*, the signatory histories of Eastern and Petitioners and their respective affiliates) this case is on all fours with *Eastern*. Petitioners respectfully submit this reply to address certain new points offered by the Commissioner and Trustees in their oppositions to the Petition for Writ of Certiorari.

1. Respondents do not dispute (because they cannot) that Eastern was in a control group with EACC when that company signed the 1974, 1978, 1981 and 1984 coal wage agreements promising lifetime health benefits to UMWA retirees. That relationship did not affect the analysis or outcome in the opinions authored by Justice O'Connor and

Justice Kennedy. Although Petitioners are in the same position, Respondents insist they are different from Eastern. *See, e.g.*, Trustees' Opp. at 2 ("[Petitioners] either own or are under common control with more than a dozen 'related persons' that signed NBCWAs in 1974, 1978, 1981, or 1984. [Petitioners] thus are readily distinguishable from Eastern").

In determining whether *Eastern* should be applied to Petitioners, the Commissioner's task was to identify the material facts in that case and apply the result to all companies presenting the same or substantially identical material facts. The Commissioner did not carry out this responsibility as required. Instead, the Commissioner looked beyond the material facts in an effort to find some other basis for distinguishing Petitioners from Eastern. The Commissioner's refusal to extend the Court's decision in *Eastern* to Petitioners was not based on a material factual difference, rather it rested solely on a statutory difference -- the applicability of the related person definition to Petitioners but not to Eastern. By relying on this statutory difference, and ignoring the fact that in every substantive way Petitioners present a case identical to Eastern's, the Commissioner wrongly narrowed the reach of *Eastern*.[1]

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[1] No one's health care benefits will be adversely affected if the holding in *Eastern* is extended to Petitioners. As with Eastern's beneficiaries (and the beneficiaries of other companies whose assignments were withdrawn in response to *Eastern*), beneficiaries assigned to Petitioners would be recharacterized as unassigned beneficiaries, and the cost of their benefits will be provided for by the annual transfer payments made from the Abandoned Mine Land Reclamation Fund ("AML Fund") to the Combined Fund. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). To date, annual transfer payments from the AML Fund and from other sources authorized by the Coal Act have covered the health benefits of all unassigned miners. Should the annual AML Fund transfers ever prove insufficient to cover these costs, the Coal Act provides that assigned operators will make up the difference on a pro rata basis. 26 U.S.C. § 9704(d). This structure ensures that no Combined Fund beneficiary will ever lose coverage.

2. Apparently recognizing that the related person definition alone may not provide a basis for surmounting the constitutional defect in *Eastern*, the Commissioner and Trustees seek to ascribe to related person status a larger statutory purpose than merely expanding the universe of entities that may be held liable as guarantors for a signatory employer's constitutionally valid premium obligations. In this regard they seek to marry the related person definition at section 9701(c)(2) with the employment aggregation rule at section 9706(b)(1) of the Act, 26 U.S.C. § 9706(b)(1), to impute the signatory status of one member of a controlled group to all members of the group. Comm. Opp. at 14 n.6; Trustees' Opp. at 7-8, 25.

Building on this, Respondents argue that Congress provided yet another statutory basis for distinguishing Petitioners from Eastern, because under section 9706(b)(1) employment by Petitioners is constructive employment by any member of Petitioners' controlled group that signed a 1974 or later coal wage agreement. In developing this argument Respondents conveniently quote only part of the Coal Act's aggregation rule. Comm. Op. at 5, 14 n.4; Trustees' Opp. at 8. In its entirety the provision reads:

> **(b) Rules relating to employment and reassignment upon purchase.**—For purposes of subsection (a)—
>
> **(1) Aggregation rules.**—
>
> (A) **Related person.**
>
> Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

26 U.S.C. § 9706(b)(1)(A).

When read in context, the purpose of the rule is clear; for purposes of making assignment determinations under subsection (a) (which allocates assignments to operators based, in part, on length of employment as among several different employers), the Commissioner is to aggregate periods of employment where the miner worked both for a signatory operator and a related person to that signatory operator. Indeed, there is no other purpose for the rule, because the statute separately specifies that a related person is liable for an assigned operator's Coal Act obligations.

This rule does not direct the Commissioner to treat all related persons as if they were a single entity with regard to their signatory status, nor does it authorize the Commissioner to impute to Petitioners the signatory status of other controlled group members that may have been signatory to a 1974 or later agreement. "Aggregation" means to add together and that is how the Commissioner applied this provision in making assignments. Where a miner has worked for more than one related person the Commissioner aggregates the employment for purposes of determining which employer among many is to receive the assignment.

The Commissioner fails to mention that she assigned the beneficiaries challenged in this case to Petitioners under section 9706(a)(3) (the lowest assignment priority which applies only to operators that did not sign a 1978 agreement). Although Petitioners are related persons to 1978 signatories, the Commissioner did not make assignments to Petitioners by attributing 1978 signatory status to them. In defense of her refusal to apply *Eastern* to Petitioners the Commissioner has embarked on a line of argument that the statute does not support and that she has not previously followed. Indeed, if it is now her position that the signatory status of one control group member is imputed to all companies in the group, she would have to

reconsider and possibly reissue thousands of previous beneficiary assignments because many assignments made under section 9706(a)(3) – the category of last resort – should instead have been considered for assignment under a higher statutory priority.

3. Under the statute, assignments are not made to a "control group." Rather, based on a review of each miner's individual work history and on the signatory status of the miner's various employers, the Commissioner is required to assign the miner to the signatory operator still in business who met the highest level of assignment criteria. 26 U.S.C. § 9706. Other than the aggregation rule, which applies where a miner worked for more than one related person, the fact that a miner's employer had one or more related persons did not figure into application of the assignment criteria unless the employer was out of business, in which case section 9706 authorized the Commissioner to make the assignment to a related person of the defunct employer. This is how all assignments were made, and it is disingenuous for the Commissioner (and error on the part of the court below) to contend that assignments are somehow made to an entire control group, or that signatory status of one company may be attributed across all members of the group.[2]

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[2] In her opposition brief, the Commissioner is careful to say that she "sustained" Petitioners' assignments on the basis of their control group membership. Comm. Opp. at 14 n.4. She pointedly does not say that assignments to Petitioners were made on a control group basis, or because Petitioners were a "related person" to a company that had separately signed a 1974 or later coal wage agreement, because they were not.

The Commissioner also incorrectly contends that the court of appeals did not address whether "the Commissioner lacked authority to maintain their assignments based on whether the controlled group, as a whole, employed the miners at issue and signed 1974 or later NBCWAs." Comm. Opp. at 14 n.4. That is precisely what the Fourth Circuit concluded. App. A-11-12, A-23-26.

4. The Commissioner acknowledges that "the plurality and concurring opinions emphasized that Eastern had not signed the 1974 NBCWA, which was the first to make an explicit promise of lifetime health-care benefits, or any subsequent NBCWA, and thus could not reasonably have contemplated being held responsible for providing such benefits." Comm. Opp. at 12. This notwithstanding, the Commissioner claims in this case that "petitioners could reasonably have anticipated that they would be required to provide lifetime healthcare benefits for their retirees. That is because petitioners are (and at all relevant times have been) members of a commonly controlled group of corporations, other members of which signed the 1974 and subsequent NBCWAs promising lifetime benefits not only to their own retirees, but also to other retirees who were 'orphaned' by their employers." Comm. Opp. at 12. This is a non-sequitur. Eastern also was in a control group with EACC, a 1974 signatory, from 1974 to1987 and EACC made precisely the same "promises" as Petitioners' related 1974 signatory affiliates. Moreover, Eastern's management closely directed the labor relations of EACC and Eastern received substantial dividend revenues from its wholly-owned subsidiary. *Eastern*, 524 U.S. at 516 (plurality), 565-66 (Breyer, J., dissenting). Plainly, there is no reason that Petitioners should have been more prescient than Eastern in anticipating that Congress might require them to provide lifetime healthcare to their former employees.

5. The Commissioner claims that "[i]t is reasonable to presume that the entire controlled group profited from the services rendered by its employees in return for its promises of lifetime benefits." Comm. Opp. at 14-15. Insofar as that argument has any merit at all, it applies equally to Eastern whose wholly-owned 1974 signatory subsidiary paid more than $100 million in dividends to Eastern from 1966-1987. *Eastern*, 524 U.S. at 516 (plurality), 565-66 (Breyer, J., dissenting). Therefore, profiting from the services a retiree

may have rendered to an affiliate provides no basis for the Commissioner's claim that Petitioners are not in substantially the same position as Eastern.

6. If Eastern had never been affiliated with a 1974 signatory (or had disposed of its interest in a signatory company prior to 1974), then the Commissioner's claim that Petitioners are not substantially identical to Eastern would have merit. Of course, this is not the case because it is clear Eastern was a related person to a 1974 signatory from 1974 through 1987 as a factual matter although not statutorily. The only reason the Commissioner offered for her conclusion that Petitioners are not similarly situated to Eastern is the timing of Petitioners' relationship to 1974 signatories (*i.e.*, that they were related on July 20, 1992). The Commissioner did not base her administrative decision on the presence or absence of any other connections between Petitioners and their 1974 signatory affiliates.

In their opposition brief the Trustees engage in a lengthy diatribe about the Petitioners' involvement in the coal industry, presumably for the purpose of convincing the Court that Petitioners are not deserving of the result afforded by *Eastern*. *See* Trustees' Opp. at 9-13. The problem with this entire argument is that the Commissioner did not rely on any of this in making the administrative decision under review. Indeed, we know that none of this was relied on or relevant to the Commissioner's decision, because she would have refused to withdraw Petitioners' assignments even if their only connection to a 1974 signatory was a brief control group relationship with a 1974 signatory only during the month of July, 1992.

The Commissioner's theory is that attaining "related person" status under section 9701(c)(2) of the Coal Act provides a "material fact" sufficient to differentiate a pre-1974 signatory from Eastern. Achieving this related person status does not turn on how long companies have been

related, the only determinant is whether they were related on July 20, 1992 (or immediately prior to the time the signatory employer ceased to be in business). The only aspect of Petitioners' corporate history relevant to the Commissioner's refusal to extend the holding in *Eastern* to them is the fact that on July 20, 1992 their corporate controlled group included a company that had signed a 1974 coal wage agreement. The Trustees' "supporting facts" concerning Petitioners' history are just makeweight, proffered to deflect attention from the fact the Commissioner's position is simply unsustainable as a matter of constitutional law.

7. The Respondents' real argument seems to be that if Congress had chosen in the Coal Act to assign liability only to 1974 or later signatories, and make all 1974 signatories liable for miners who had worked for related companies, then such a system would have been constitutional. The problem with their effort to characterize the issue in this manner is (a) that is not what Congress did, (b) that is not the way the Commissioner made assignments, and (c) while that particular statutory structure might have presented issues requiring clarification by this Court, that is not the liability assignment scheme before the Court in this case.

The issue presented in this case does not concern what Congress did not do. It concerns solely the facts presented in Eastern's case and whether the Commissioner wrongly refused to apply the holding in *Eastern* to Petitioners.

8. The Commissioner and Trustees assert that this case is not of continuing importance. This is difficult to reconcile with the fact that the same issue is presented in two other pending petitions for certiorari. *Berwind Corp. v. Commissioner of Soc. Sec.*, 301 F.3d 222 (3d Cir.), *petition for cert. filed,* No. 02-995 (U.S. Dec. 24, 2002); *Shenango Inc. v.*

Apfel, 307 F.3d 174 (3d Cir. 2002), *petition for cert. filed*, No. 02-1419 (U.S. March 21, 2003). Furthermore, Petitioners are aware that the same issue is also presented in several other cases pending in the lower courts. *Wheeling-Pittsburgh Steel Corp. v. Commissioner of Soc. Sec.*, No. 5:99CV60 (N.D. W.Va. May 22, 2002), Nos. 02-1799, 02-1800 (4th Cir. filed July 29, 2002); *Nell Jean Indus., Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002) (time for filing notice of appeal has not yet run); *Holland v. Turner Elkhorn Mining Co.*, No. 1:02CV02248 (D.D.C. filed Nov. 14, 2002).

CONCLUSION

For all of the forgoing reasons and all the reasons presented in the Petition for Writ of Certiorari, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

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